OCTOBER 1961 • Volume 47 • Number 10

American Bar Association JOURNAL

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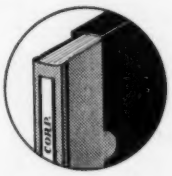

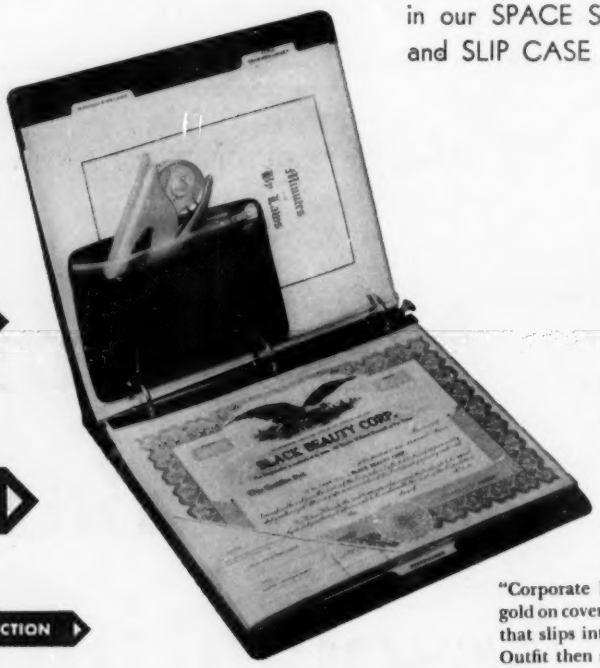

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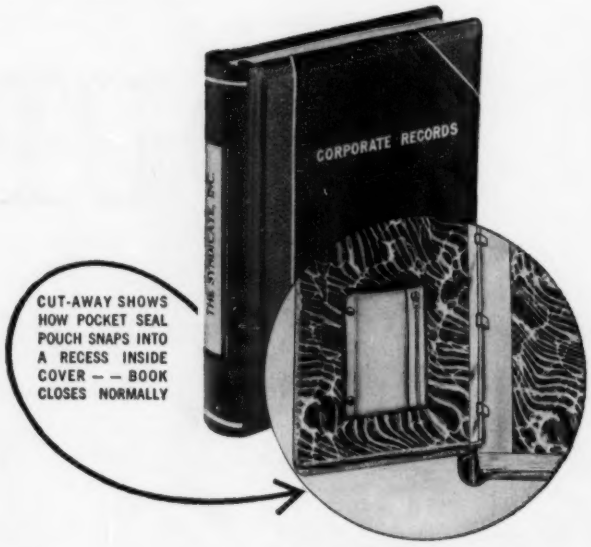

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October, 1961

VOLUME 47
No. 10

Table of Contents

American Bar Association JOURNAL

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.

Second class postage paid at Chicago, Illinois.

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Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

POSTMASTER: Send notices by Form 3579 to AMERICAN BAR ASSOCIATION, 1155 East 60th Street, Chicago 37, Illinois.

Closing the Gap!

MOST OF US have some form of planned retirement should we "live too long."

AND THERE is life insurance should we "die too soon."

BUT A GAP REMAINS in the curtain of family protection for the majority of us — it is the void that exists if a prolonged disability due to illness or injury should cut off our income and place our domestic economy in jeopardy. This gap — the dread of having to face months and years without income — can now be closed for you by your participation in the

ENDOWMENT GROUP DISABILITY INCOME PROGRA

Full details of the Endowment Group Disability Income Plan are contained in the brochure "*The Case for Security*" which has already been mailed to all members.

If you have not yet received the brochure, it will arrive soon. Please be on the look out for it. If you need extra copies, mail your request to the American Bar Association Endowment, 1155 East Sixtieth Street, Chicago 37, Illinois.

After more than a year of research and study by the Board of Directors and a special Insurance Committee appointed by the Endowment, this Group Disability Income program is announced with the confident expectation that its excellence will be recognized by a high degree of participation among members throughout the country.

If this program is as successful as is anticipated it will provide the Endowment with a source of funds in the form of experience credits, comparable to the dividends being received from the Group Life Insurance program. This will enable the Endowment to expand its work in carrying out its charter purposes.

The monthly benefits range from $200 to $600 and premiums may be payable semi-annually. There is a choice of "waiting" periods—*one month or one year*—and enrollment is invited from every member under age 60 at entry.

This new Endowment insurance program is underwritten by the Continental Casualty Company of Chicago, Illinois.

Even if you already have some Income Insurance through your local Bar Association, you are probably still below the level of your desired income replacement requirements. Once you are enrolled in this program, the benefits are payable in addition to any other insurance you may carry.

And if you do *not* participate in any such local plan, even a brief glance at "The Case for Security" will convince you that the Endowment program can best meet your needs—simply and inexpensively.

Important News for Lawyers Under 35

Be sure to see the special enrollment provisions for attorneys under age 35 in the October issue of *"THE YOUNG LAWYER."*

AMERICAN BAR abae ASSOCIATION ENDOWMENT

The President's Page

John C. Satterfield

On August 30, 1906, a young Nebraska professor, then only 36 years of age, rose and said these words which have rung down the years concerning the administration of justice in the United States:

> Passing to . . . the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the time. Uncertainty, delay, and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible businessman in the community.
>
> Our system of courts is archaic in three respects: (1) In its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects . . . too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times.

Recently, I spoke at a luncheon honoring that young professor, Dean Roscoe Pound, for the tremendous service he has rendered to our profession throughout his long and fruitful life. Dean Pound is now 91 years of age and, as the Nestor of the legal profession of the United States, has just completed a five-volume work: *Jurisprudence,* which is a major contribution to the literature of the law. When the above words were spoken, the writer was two years of age. Do his words apply to the administration of our courts today?

Throughout the years, yeomanlike work has been done by men like Chief Justice Arthur T. Vanderbilt, Herbert Harley, Judge John J. Parker and many others. Yet, in spite of the efforts of the lawyers and judges of the United States individually and through many organizations, a half century later, in August, 1958, Chief Justice Earl Warren described the status of judicial administration in the United States as follows:

> . . . interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States. Today, because the legal remedies of many of our people can be realized only after they have been sallowed with the passage of time, they are mere forms of justice. And, to the extent that this is so, there is created a disrespect for law at a time when everyone should be continually conscious of the fundamental principle that it is primarily the law and its adequate enforcement which makes individual liberty possible.

No program of the American Bar Association is more important than that of the Joint Committee for the Effective Administration of Justice. This Committee is setting up a massive program designed to reach every state in the Union, under the leadership of Tom C. Clark, Associate Justice of the Supreme Court of the United States, as Chairman, and Albert E. Jenner, Jr., of Chicago, as Vice Chairman. Perhaps for the first time since Dean Roscoe Pound made his stirring address in 1906, all entities of the organized Bar working in this field have joined in a co-ordinated effort, rallying their full forces to bring to the courts of original jurisdiction in every state all of the modern tools and procedures that are available to provide speedy and effective justice.

It is amazing to realize that the full strength of each of the following organizations has been placed behind Justice Clark and his Committee:

American Bar Association, American Law Institute, American Judicature Society, American Bar Foundation, Association of American Law Schools, Conference of Chief Justices, Institute of Judicial Administration, Junior Bar Conference, National Conference of Bar Presidents, National Conference of Bar Secretaries, National Conference of Court Administrative Officers, National Conference of Judicial Councils, National Conference of State Trial Judges, Columbia Project for Effective Justice.

Although it is recognized that great value lies in the preparation of studies, pamphlets and books on judicial administration, nevertheless it is thought that the most effective way to put into practice that which is so readily available is to hold seminars and institutes (at the invitation of local bar associations, judicial councils and other organizations) in each state, in which the responsible leaders of the state will be invited to participate.

The inadequacies in the judicial system of any state or locality are felt by the participants in the judicial process long before they reach sufficient proportions to receive national attention. The Joint Committee has been organized to include members who are constantly in touch with local leaders. Through these members the Committee is able to detect the need for and suggest the efficacy of the assistance which its combined effort can afford.

Faced with a specific request for assistance from a particular region or state, the Joint Committee will take immediate action. The Committee Chairman will assign one of the staff to the problem. This staff member will acquaint himself with the judicial system of the state. Thereafter he will arrange through the local applicant to meet with selected local leaders of the Bench, Bar and lay groups. The purpose of this preliminary conference will be to develop a consensus as to areas in which the courts of the state may be made more effective.

Once a consensus has been developed as to the area of most fruitful labor, the preliminary conference will select individuals within the state, a practicing lawyer, a professor of practice and procedure, a judge to form the nucleus of a local permanent committee to take on the task of planning a state-wide conference, institute or workshop meeting to study the judicial problems of the state. The agenda of the state-wide meeting will be formulated by this local committee working with the staff. Local consultants and experts will be utilized and the experience of other states made available through the use of experts from all over the country who are knowledgeable in the particular field under study. The program proposed by the local committee would be reviewed by an appropriate sub-committee of the Joint Committee and final agenda agreed upon.

In most instances the state meeting will serve as a kickoff for the local project. By preparing and circulating stimulating materials to each participant before the meeting, and by reducing to writing their conclusions at the meeting, a blueprint for action will be made available for the future activity of all concerned. By enlarging and strengthening the local committee, an interested group will be available in the state to implement the conclusions.

As certainly as information is the basic ingredient of right decisions, some of the state meetings will result in recommendations for research and more concentrated analysis. The second phase of the committee's work should be to co-ordinate existing facilities to this end and, where additional facilities are needed, to provide them. The third and final step will be to make certain that the permanent machinery is functioning properly in the state to carry out the conclusions of the meeting. Where necessary and believed to be helpful a second state meeting might be planned and conducted under the auspices of the Joint Committee. Thus, through a co-ordination of the national efforts on the problems of a given locality an optimum of effectiveness may be achieved in all of the courts of our nation.

The American Bar Association Endowment is to be congratulated on its announcement of a new Group Disability Income program for which all members under age 60 are eligible. The program is twice blessed, as the members have available a contract with terms uniquely broad, and the program permits the Endowment to receive such experience credits as may be periodically declared, and use them for its tax-exempt purposes. Incidentally, all benefits payable under the Plan are also tax-free for members who have claims. See page 936 for other details. I hope you will give thoughtful consideration to the Endowment's Group Disability Income program and enroll at your earliest convenience. Most liberal underwriting rules will be in effect during the limited charter enrollment period. It would be to your benefit to take advantage of them.

ASSOCIATION CALENDAR OF MEETINGS

Annual

San Francisco, California	August 6-10, 1962
Chicago, Illinois	August 12-16, 1963
New York, New York	August 10-14, 1964

Board of Governors

Fall Meeting (Chicago)	October 19-20, 1961
Section Chairmen (Chicago)	October 21-22, 1961
Spring Meeting (Washington, D. C.)	May 21-22, 1962
Annual Meeting (San Francisco)	August 2-3, 1962

Midyear

Edgewater Beach Hotel, Chicago, Illinois	February 14-20, 1962
Administration Committee	February 14, 1962
Board of Governors	February 15-17, 1962
Board of Governors, State and Local Bar Presidents and Bar Secretaries	February 16, 1962
Group Meetings	February 14-18, 1962
House of Delegates	February 19-20, 1962
State Delegates	February 20, 1962

Regional

Birmingham, Alabama	November 9-11, 1961
Salt Lake City, Utah	May 31-June 2, 1962
Little Rock, Arkansas	November 8-10, 1962

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar: Local Government Law; Mineral and Natural Resources Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $20.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $5.00 per year, and for three years thereafter $10.00 per year, each of which includes the subscription price of the *Journal*. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Local Government Law, $5.00; Mineral and Natural Resources Law, $7.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $20.00 for lawyers first admitted to the Bar in 1956 or before: $10.00 for lawyers admitted in 1957, 1958 and 1959; and $5.00 for lawyers admitted in 1960 or later.

Manuscripts for the Journal

■ **The *Journal* is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.**

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

American Bar Association

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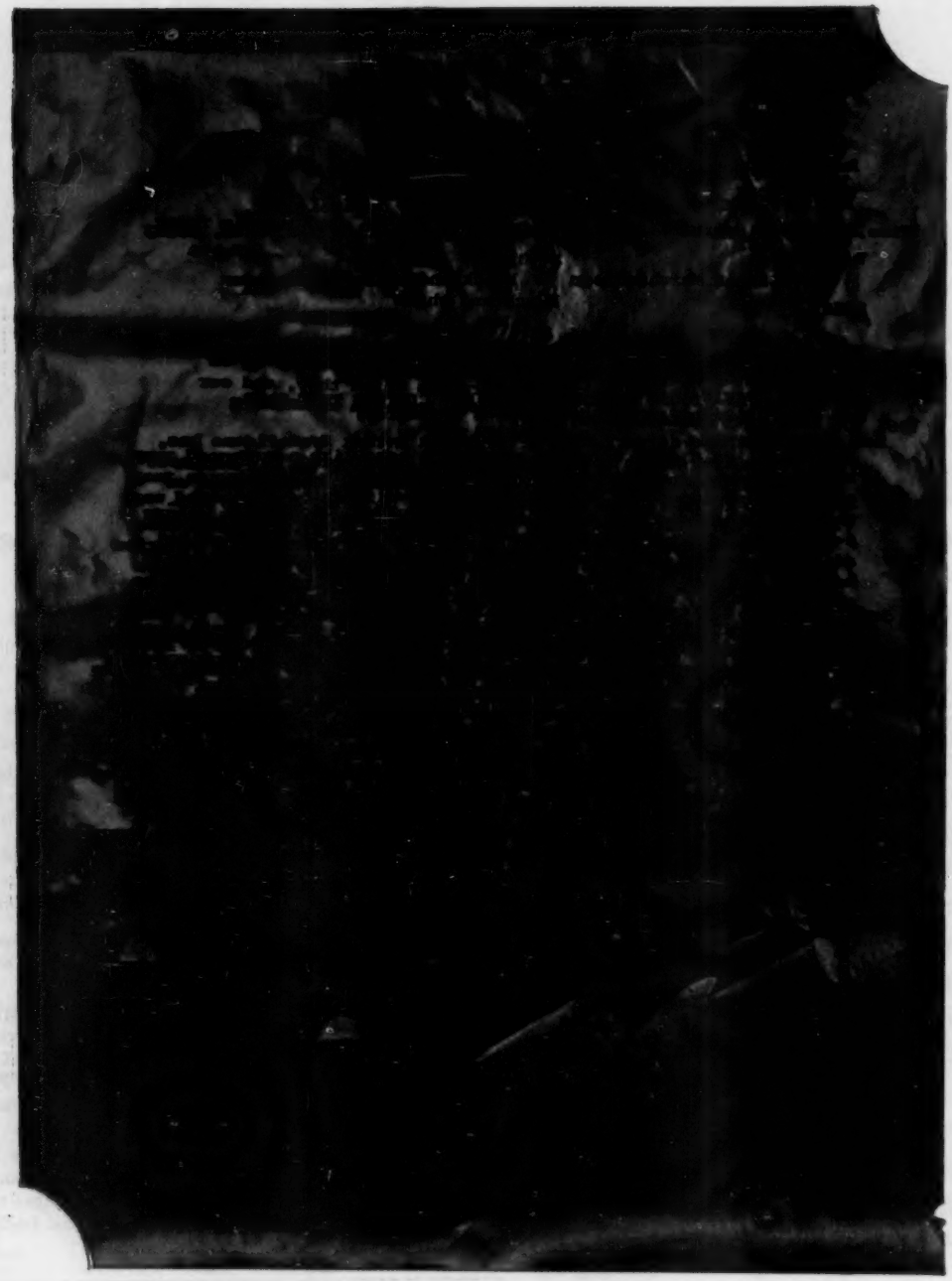

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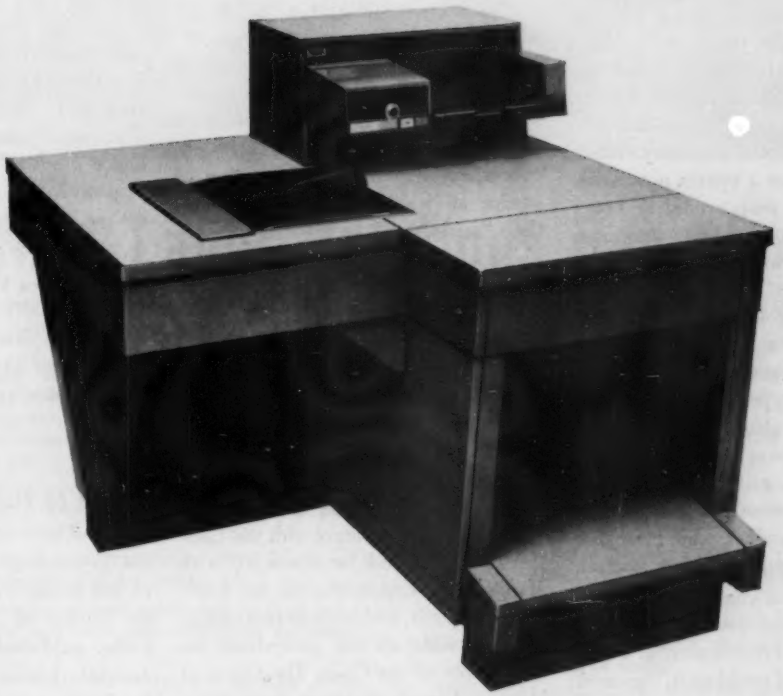

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The 914 makes permanent copies on ordinary paper. Your great grandchildren will be able to read Xerographic copies.

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A Xerox representative would like to bring a 914 Copier to your office and show it to you. But he can't. The 914 Copier is not a toy; it weighs 648 pounds. That means you'll have to come to our offices located in principal U.S. and Canadian cities. (People representing thousands of organizations, from United States Steel to the White House, are glad they made the trip. You will be, too.)

This is the end. At least for the time being.

XEROX
CORPORATION

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

The U.C.M.J. Will Work in Wartime

In his article on the Uniform Code of Military Justice (August issue), Captain Richardson expressed the opinion that the Code would not work in wartime, although it worked satisfactorily for two years of the Korean conflict. It is concededly impossible to project the past with certainty, but it would appear that a system now working for over 10 years would be better than an untried one. The voluminous precedents of which the author complained are there as guides, which, if conscientiously followed in the field, should reduce the number of appeals heard. These precedents, coupled with the centralized appellate and clemency system, should also produce greater uniformity than was enjoyed in World War II. The author of the article recognized that the system has been abused by some commanders who refer too many cases to general courts martial.

The author was concerned that the Code's requirement for qualified lawyers in all general courts martial would create a personnel problem in the event of mobilization. He apparently overlooked the Army's reserve training program by which its judge advocates are kept current in their field. In a later section of the article, the author gave credit to this requirement of the Code for raising the quality of the trial work.

The author expressed displeasure at the delay in appeals of capital cases. In the two examples he cited, however, the greatest delays came *after* the cases were decided by the Court of Military Appeals. Moreover, there appears to be nothing in the present Code which would prohibit advancing such appeals on the Court's calendar.

The author found that the World War II system functioned "fairly well". His goals for the future call for higher standards. Although there may be differences of opinion as to the efficiency of the various systems, those who are concerned with the administration of justice all want it to function better than "fairly well".

JOSEPH T. RYAN
Jersey City, New Jersey

He Agrees that the U.C.M.J. Won't Work

I have just finished reading "A State of War and the Uniform Code of Military Justice", by Captain George L. Richardson.

As a legal technician in the USAF, I have had daily contact with the Code for 15 years, and have worked with *Manuals for Courts-Martial* for 1928, 1949 and 1951, and became thoroughly familiar with all the procedural requirements of the Code. The Court of Military Appeals decisions interpreting the *Manual* and Code make them somewhat unwieldy in peacetime, especially within the framework of a trial by Special Court-Martial. I cannot say more than that I whole-heartedly agree with all the comments made in this fine article. I hope that it will receive wide reproduction so the "powers that be" can see the problems that will arise in case of an all-out war.

WILLIAM R. COLON
Technical Sergeant, USAF
Dover, Delaware

More on the Sacco-Vanzetti Case

Mr. Nicholas Granet's letter in the June, 1961, issue of the *Journal* should not pass without some comment. He seems to place great weight on Judge Musmanno's January article in the *Journal* on the *Sacco-Vanzetti* case. I suggest that Mr. Ganet read the full record of the case and then read the excellent book *Sacco-Vanzetti: The Murder and the Myth* (Montgomery) which will perhaps prove enlightening. . . . It's about time a professional appraisal of the facts was presented and I believe Mr. Montgomery has done just that. I'm surprised the book was not reviewed in the *Journal* (on second thought I'm not so surprised).

I also take issue with Mr. Granet's slur on the "mortality" of the trial bar, when he intimates "that the majority of the American Bar disagrees" with his view as to the purposes of a lawsuit. This type of charge does nothing to enhance our profession or our relationship with the general public and, of course, is completely exaggerated.

D. A. WALSH, JR.
New York, New York

EDITOR'S NOTE: A review of *The Murder and the Myth*, by Robert H. Montgomery, appears on page 1004 of this issue.

Books to India

I read with much interest, the pleasant proceedings of the gift ceremony of law books by American lawyers to the library of the Supreme Court of India, published in June issue of the *Journal*. I take pride in the fact that the U. S. legal fraternity has laid the permanent foundation for the establishment of a common bridge between the judiciary of India and your country by this gesture of good will and friendship. The Supreme Court of United States is a great institution that has stood for the promotion, the consolidation, to ensure and safeguard the "inalienable" rights, given by God and guaranteed by your Constitution. Rightly, it has been called the "Sentinel

(Continued on page 946)

(Continued from page 944)

on the Qui Vive"; and so too the Indian Supreme Court for the same reasons. May the institution grow from strength to strength! . . .

P. NAGARAJA RAO
Nandyal, South India

His Lawyers Are Probably Still Working on It

Some time ago we read in the newspapers of the somewhat whimsical, somewhat folksy will of a well-known Philadelphia testator. I refer to the well-publicized will of the late Mr. Kelly, father of Princess Grace. I'm sure many, outside the Bar at least, were delighted with Mr. Kelly's disdain for our venerable and well-honed legal phraseology, and his insistance on calling a spade just that. ("Let's call kids, kids . . . and not issue", as I recall the story.)

A news story like that calls for a follow-up. What legal snarls, if any, have emerged from the will to taunt the spirit of one so presumptuous? Has the will been admitted to probate? Did Mr. Kelly succeed in out-foxing the whole legal profession?

ROBERT F. JEFFERIS
Dayton, Ohio

Wrong Date for the Fall of Fort Donelson

I enjoyed very much the interesting article of Hobart F. Atkins entitled "A Case of Whisky" appearing in the June, 1961, issue.

I did not write to correct one error appearing in the article for the reason that I believed that you would be besieged with letters.

Apparently, there are not as many Civil War buffs in the legal fraternity as I thought, for I have not seen any letters relative to the error.

Fort Donelson fell February 17, 1862, and not 1864 as appears in the article.

This minor slip on the part of Mr. Atkins does not detract from the article but it is something that a Civil War addict can not let pass without taking pen in hand.

EDWIN A. GLOVER
Elkland, Pennsylvania

He Agrees with Mr. Cantrall

Mr. Arch Cantrall's comments entitled "A Country Lawyer Looks at Canon 35" in your August, 1961, issue are welcome reading. I congratulate him upon the attention he has given the matter. I hope and believe his feelings represent those of a majority of our Bench and Bar. We need more attention devoted to protection of our judicial process from the adverse influences working upon them. The English rule, as Mr. Cantrall suggests, would be a welcome addition to our practice, as lawyers who defend criminal matters would, I am sure, agree. Nor can we ignore the prejudice afforded one or the other party in other types of litigation by the sensational treatment given the circumstances out

(Continued on page 948)

(Continued from page 946)

of which they arise in the communication media.

The considerations recited by Mr. Cantrall as tending to diminish the availability of witnesses are applicable to other practices with which we lawyers should be concerned. For example, how many of our tort practitioners supply copies of signed statements to the witnesses from whom they have been procured? One gathers the standard practice among adjusters is otherwise. Need it be argued that the prospect of being confronted with a signed statement available to the opposition, not seen since it was signed, framed in the language of an adverse investigator and covering matters long since grown dim in memory tends to discourage many a witness from willing appearance?

I hope these matters are the subject of renewed attention and scrutiny. Lest we lose the effectiveness of our judicial process, Bench and Bar must endeavor to strengthen them against the inroads of commercial interest, whether in the communications field, or on the part of liability insurers, which interfere with the key element in the production of evidence, the testimony of a knowledgeable witness.

NOAH S. ROSENBLOOM

Redwood Falls, Minnesota

A Prejudiced Witness

Effective October 1, 1961, please change my address on your records to:

Major Rowland L. Young, 0960018, HQ, 322d Logistical Command (C), Fort Lee, Virginia.

Please take care of this at once. I'd hate to miss a single issue of that excellent *American Bar Association Journal*. The *Bar News* is all right, I suppose, if you want to read about *that* kind of bar, and the Annual Reports look pretty when they're lined up on the shelf, but I can't imagine anyone reading one of them unless he was trying to cure insomnia. But the *Journal!* It's the greatest publication in the world, if not in all outer space too. I read every word of it every month, over and over again, so please make sure that I don't miss a single copy.

Remember: Nothing is too good for our men in uniform! So I want the *Journal*—it's the best.

ROWLAND L. YOUNG

EDITOR'S NOTE: The author of the above letter has been a valued member of the *Journal* staff for almost 13 years. The occasion for the letter was his departure to answer a call to military service. We are sad at losing him. The *Journal* faces a serious problem in trying to find a worthy replacement.

(Continued on page 950)

(Continued from page 948)

Mr. Cantrall "Hits the Nail on the Head"

The article by Arch Cantrall, "A Country Lawyer Looks at Canon 35", in the August, 1961, *Journal*, squarely hits the nail on the head. The real issues at stake are fair trials and the efficient and orderly administration of justice. Both are imperiled by undue, fragmentary, hasty and sensational publicity on trials in progress.

MAURICE H. MERRILL

Norman, Oklahoma

Law Schools and Graduate Illiteracy

At the risk of carrying coals to Newcastle I should like to call to your attention, and suggest for republication in the *Journal*, an article entitled "A Law School Fights Graduate Illiteracy", by Thomas M. Cooley II, Dean of the School of Law at the University of Pittsburgh, appearing in the *Saturday Review* for August 12, 1961, at pages 39-41.

It seems to me that this excellent discussion of a very real problem among today's law school students and graduates deserves much wider reading by members of the Bar than it can possibly have in a literary but non-legal magazine such as the *Saturday Review*.

If you do not have access to this article I should be very happy to send you a copy of it.

May I add a personal note of praise for the content of the *Journal*. Speaking for myself I enjoy particularly the "Books for Lawyers", the "Review of Recent Supreme Court Decisions", and the occasional articles on famous cases and lawyers of the past.

PAUL S. CLARKSON

Baltimore, Maryland

EDITOR'S NOTE: The policy of the *Journal* prohibits the republication of articles which have appeared elsewhere. This letter is published here for the information of our readers.

Another Reply to Mr. Cantrall

In "A Country Lawyer Looks at Canon 35", in the August, 1961, issue of the *American Bar Association Journal*, Arch M. Cantrall put forth as the *raison d'être* of the prohibition against permitting broadcasting and televising of judicial proceedings and the taking of photographs in court, the reluctance of many witnesses to testify if they thought that their appearance in court would be broadcast or televised. In fact, he goes so far as to say:

> Can it be that this craze for publicity is so important? Is it of no consequence that the accused or the prosecution may be deprived of even one material witness in a criminal trial, or that a civil litigant may be unable to prove his case?

I am afraid that Counselor Cantrall has overlooked a very important principle of our jurisprudence—that is, a public trial. Surely Counselor Cantrall is aware that many people do not have the necessary respect for truth and that only fear of a perjury charge prevents or inhibits their lying under oath. These people may well be reluctant to lie under oath when they know that their lies may be published so that anyone having proof of such lying would also be made aware of the lying.

In my opinion, Canon 35 should not be indiscriminately amended for the sole purpose of maintaining dignity and decorum, but not for the purpose of encouraging secret or semi-secret trials.

If Counselor Cantrall is against publicity, would he also favor barring the general public from the courtroom on the theory that their presence might cause some witnesses to become reluctant to testify. It seems to me that a trial in camera would merely bring back the star chamber proceedings and all the injustices inherent therein. Publicity and public trials are an asset rather than a liability—so long as

(Continued on page 953)

This authoritative 94-page book has just been published and is available without charge to professional men. Written by Alden Guild, J.D., in collaboration with Deane C. Davis, President of National Life of Vermont, and David F. Hoxie, Associate Counsel of the Company, it is a useful guide to the successful formation and funding of professional-partnership purchase agreements.

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(Continued from page 950)

court dignity and decorum are maintained.

GEORGE NIMS RAYBIN

New York, New York

He Contends Annual Report Was Inaccurate

In the 1960 Report of our Association, in its account of the proceedings of the Assembly at the Annual Meeting, there appears the following:

> Resolutions six and seven . . . recommended Association approval of Constitutional amendments providing that no U. S. employee, appearing as a witness before any agency empowered to interrogate, shall have recourse to the fifth amendment, however, his answer shall not be used against him in any subsequent criminal prosecution. These resolutions were referred to the Committee on Jurisprudence and Law Reform [page 288].

In point of fact, only Resolution Six referred to a person holding office or employment under the United States. That resolution was confined to questions "regarding his official conduct". It did not contain the proviso, set forth in the excerpt above quoted, which begins with the word "however".

Resolution Seven dealt with a quite distinct subject, namely "a witness in any federal judicial or administrative proceeding". It did contain the proviso above referred to.

Any member of the Association interested in the text of these resolutions, which are still under consideration by the Committee on Jurisprudence and Law Reform, may obtain a copy by writing to the Executive Director of the Association.

LEWIS MAYERS

New York, New York

Teaching Students To Practice Law

In a recent article in the *American Bar Association Journal*, Professor J. Henry Landman has offered the critique that: "The most serious defect in our legal educational system is the fact that our law schools do not adequately prepare young people for the practice of law."

His chief target of attack is the "case system" of education, first promulgated by Dean Langdell of the Harvard Law School as long ago as 1870 and fol-

lowed in nearly all law schools to the present day. In rebuttal, the learned Professor presents an invention of his own which he labels the "problem method". . . .

Looking back at our own experience, it has always seemed that if a young man is destined for the law, he should be made aware of the functions of a lawyer, the problems to be met, and the way of life to which he intends to dedicate himself, much earlier than he does today. There seems to be no good reason why that should not begin while he is an undergraduate in college. Such a program is followed in many colleges and the effect is to shorten his post-graduate law school course to two years. His curriculum should be made to include, in addition to law, courses in political economy and, if possible, business administration.

Legal Aid work should be greatly enlarged and attendance in these offices under the tutelage of experienced lawyers made compulsory.

Two years' attendance at law school should complete his preliminary post-graduate training. He should then take a third year to be devoted to the subjects exclusively pointed toward the specialty in the law for which he seems best suited.

Then there is the extracurricular phase of his preparation. Our student, while studying the academic side of the law, should be required to take an active part for at least a part of the year in his home community in work involving public relations. Just what this will include matters very little—possibly it means charitable drives or local politics. This is only for the purpose of broadening his perspective and realizing that the lawyer is intended to be a leader.

When all is said and done—why should we have any fear for the ultimate success of our law school graduates?

ALDEN AMES

Menlo Park, California

He Endorses Dr. Gerber's View

The article by Dr. S. R. Gerber, Coroner of Cuyahoga County, Ohio, published in the recent May issue, and entitled "Practical Use of Results of Biochemical Tests for Alcohol", was most timely and extremely well written. The scientific explanation was very clearly and concisely presented, and was made understandable for laymen like myself. Perhaps the fact that Dr. Gerber's views coincide with my own had some affect upon my impression.

It seems apparent in our jurisdiction that a prosecutor has little chance of obtaining a conviction on a driving-while-intoxicated charge unless his evidence is substantiated by either a high percentage blood test result or the positive testimony of a medical doctor who has observed or examined the alleged drunk. It has been my experience that the mere testimony of police officers, based upon purely objective observations of the driver's physical attributes,

(Continued on page 956)

(Continued from page 954)

is generally insufficient to convince a jury that the driver was intoxicated.

Consequently, I have recently instituted the following procedure: when a driver is suspected of driving while intoxicated, he is asked to take a blood test; if he refuses to take a blood test, a medical doctor is called and he is observed and examined by the doctor; the doctor then makes a report of his observations of the physical condition of the driver, and his professional conclusion; if the doctor believes the driver to be under the influence of alcohol, then I feel that his testimony, corroborated by the observations of the arresting officers and other possible witnesses, gives me sufficient confidence in a charge of driving while intoxicated to proceed with prosecution.

I wholeheartedly agree with Dr. Gerber that no one single factor in this situation is controlling, including a blood test. And I believe it to be the inherent responsibility of the prosecutor to weigh all evidence and indicia before formal charges are instituted.

RICHARD MILLS

Office of the State's Attorney
Virginia, Illinois

Re Taxation of U. S. Citizens Abroad

Since we have no vote in the United States and our only defense consists in publications in the United States and since I have been a member of the American Bar Association for many years I suggest the publication of the following:

The Gore Bill is bringing to an issue the old theory of taxing Americans living abroad on their earned income as well as on unearned, which is now being taxed.

This tax would submit all Americans resident abroad to the same tax as an American would pay if he lived in the United States and had access to United States courts, police and other protection.

The purpose of the Kennedy Administration is to encourage the sale of American goods abroad. It is obvious that the best salesman of American goods is an American.

Yet an American veteran living abroad is denied many benefits simply because he lives abroad.

An American living in a foreign country may take back as gifts up to $10 U. S. currency. So may any foreigner. A tourist may take back $500 U. S. currency worth of goods.

An American living abroad has no vote and, under our democratic system, it is the vote and the right to vote that gets protection. The Declaration of Independence twice gives as a reason for the Revolution the denial of representation and taxation without representation.

It has been questioned whether there is adequate protection of American rights abroad—witness oil expropriation in Mexico and the general moving in against Americans in Cuba. Taxes are paid by the citizens for protection. The theory seems to be that if an American works for twenty years and builds up a respectable capital and it is seized with no compensation, then the risk was his, but let him settle with, say the Cuban Government for cash, then that is taxable income for the privilege of being an American. The settlement of course would be for much less than the value of property seized.

One Mexican compared the rights Americans have in Mexico with the rights Mexicans have in the United States. He contrasted the fire department and the police protection systems and public schools. Private schools in Mexico cost per month no less than $20 U. S. currency, per child. The public schools are inadequate and an American child would be lost in them. Public schools in the United States are free to all Americans and foreigners as well.

Americans abroad pay a local income tax in most foreign countries. Germans, British, French, Canadians and even the Japanese abroad pay no tax to their home government and therefore the products from their countries can be sold cheaper than American goods will be sold because the Gore tax will create a higher wage and salary requirement and is another competitive element created by the United States (if the Gore Bill becomes law), against the sale of its own goods abroad.

All American companies with branches abroad will be affected because American wage and salary earners will require a raise to meet the tax. If Americans abroad, with all of the unsanitary conditions, the discrimination against them, the language barriers, the hazards of property ownership, confiscation at will, now (if the Gore Bill becomes law) must pay the same tax as they would pay in the United States, what inducement is there then for them to live abroad? Is it the purpose to call all Americans home or compel them to naturalize themselves abroad?

ROSCOE B. GAITHER

Mexico City, Mexico

The Need for Reappraisal of Leadership of the Bar

Mr. Ernst states flatly that the lawyers of the country have either abandoned or lost their role of leadership. He traces this to a number of causes: failure to communicate ideas to the public; use of the committee process which is antithetical to leadership by its nature; the refusal of the best lawyers to handle negligence cases or serve as defense counsel in mine-run criminal trials; the denigration of new lawyers by established leaders of the Bar. What is needed, Mr. Ernst declares, is a leader with fire in his belly to let the people know that the legal profession does really care about truth and justice.

by Morris L. Ernst • ***of the New York Bar (New York City)***

MY SCANT qualifications for addressing myself to this subject arise out of such meager tidbits as the fact that I have nearly finished my first fifty years of practice at the Bar and that during these years I have had a love affair with the law and a particular romance with the First and Fifth Amendments of our Federal Constitution. In addition, maybe I have gathered some extra knowledge because, for thirty-five years, I have spent a week or more a year visiting with students at colleges and law schools, thus continuing my adult education by getting the reaction of the more nearly right, the next generation.

Of course, I start with a very profound prejudice: I believe that history will prove that the legal profession, in our culture, is the only skill or discipline equipped, fit and qualified to lead the people. We are taught to ambush truth; truth in its relationship to human beings; man to man; parents to children; and individuals in relation to their sovereign governments, whether city, state or national. Other sciences and skills also seek truth, but we, above all others, have access to the forum, the forum known as courts, hearing rooms, quiet chambers where, through adversary positions of advocacy, truth has a better chance of winning than by any other method so far discovered by man. To be sure, lawyers in a high percentage still act as legislators and fill superior posts in the executive branches of our governments. Members of our profession have made mighty contributions on boards of directors of charitable and educational institutions, but I suggest we must be concerned in terms of the leadership needed by the people of our fluid democracy, leadership in aid of and supplementary to and often necessarily in advance of, the leadership supplied by our elected officials or the highest of our judicial officers. We are the communicators of the techniques of a peaceable society—the rule of law.

In 1787, when our nation was founded in Philadelphia, history shows that the culture was slow-moving and the economic bases of life were not in violent daily revolution as they are today. Of all the skills, that of the lawyer carries the greatest embarrassment with respect to leadership because ours is the only profession which also has a valid and valuable duty to slow up progress. In a slow-moving economy this embarrassment is of no great measure, but since 1900 progress and changes have been so great that those who stabilize society find it increasingly difficult to lead the people of a culture such as ours.

As man invents changes in tangible terms, law must be invented and designed to keep up with the new folkways in our society. But inventions of all sorts are the results of leaps of the human mind. No man is capable of ordering his mind: today I will invent a zipper or a cyclotron.

Any man or woman in our culture who invents a new gadget of any nature whatsoever and who by that invention bankrupts every existing company engaged in the field is hailed as a hero, is patted on the back and society says "Good work, that is progress!" But for a lawyer, life is different. Relations of man to man and man to government cannot move by whim and still have people live in comfort. In the area of stabilization of the law, we find that any client who walks into a lawyer's office to have a document examined, when told that the document is lawful, at that precise moment must then ask the next question, "Will it still be lawful in the foreseeable future, five or fifty years from now?" This duty on the lawyer to see that society does not move too quickly, that the rules become clear so that no one need guess

himself into unsuspected trouble or even into jail, this duty is an additional burden which lawyers, or at least the leaders of the lawyers, must bear when they speak to the people of our nation —when they hold up, as they should, direction markers for societal reflexes to new and ever-changing physical revolutions in our lives.

It seems apparent to me that the leaders of the Bar have lost the art of speaking to or for our people. I have no criticism—in fact applause for—the hundreds of thoughtful lawyers who spend dreary nights working at bar associations to write reports, most of which rest as secret autobiographies on the shelves of libraries. But why do we need a vested interest in our odd vocabulary since vernacular would break down the barrier between us and the public as is also the case in the communication between all scholars, scientists and men of thought with the people of a culture? If the doctor's handwriting on prescriptions they write out for patients could be deciphered, much of the power that they receive from mystery would evaporate. It is not unlike the use of Latin by the early clerics at a time when the heads of the Church had a trade union which controlled the right to read and write. So we, members of the Bar, are deeply thwarted by our terminology. Recently I've undertaken the task of editing a series of books on law for laymen, and the erudite editor brought me a report after submitting my manuscript to many non-lawyer laymen. The report indicated that words such as "plaintiff" and "defendant" became too confusing and were analogized in the minds of many readers to words such as "concave" and "convex". I learned that even the word "malice" acquired separate connotations when used in discussing matters of law for laymen and, of course, "due process", if explained in great detail on page 16 of a book, is a vague and bewildering concept to the non-lawyer when he gets to page 48. To give answer to the confusions of legal vocabulary I fear that the leaders of the Bar have listened a little too much already to the public relations expert and the advertising gentry of Madison Avenue. This is the most dangerous thing that could happen to our leadership—for us to have any truck with the men of Madison Avenue who believe that man should be persuaded by repetition. To be identified in any way with the poll-takers and the public relations experts would be an act of resignation. Surely our profession, more than any other, believes that man is rational, whereas Madison Avenue believes that man should be persuaded as an irrational person by repetition or by the tickling of glands. Repetition is antithetical to thoughtful man.

Use of Committees Saps Leadership

It seems quite apparent to me that another reason for the failure of the leadership of the Bar is the use of the committee process. I have been in total agreement for years with my wisest lawyer friend, the late Russell Leffingwell, when he wrote that he would rather have one man write a book than a committee write a report. The committee process as used in the bar association is nothing but a technique to reach the lowest common denominator of agreement. The "committee" is antithetical to leadership because by its very definition it results in "give and take" and thus compromises with the result so that no member of the committee, when the report is finally published, has the least speck of fire in his belly to carry the committee report into action or to put the content of the report on the statute books. At most the committee report device has had some aspects of leadership in negative terms to defeat a bill in the Congress. Thus, as a confession of impotence, one of the items of greatest pride touted among the leaders of the Bar of New York City is the defeat of the Bricker Amendment. The committee report did a good job in negative terms, but surely a free people cannot be led by negatives; and affirmatives which grab the imagination of man cannot easily derive from the committee process.

Maybe one of our further embarrassments is the fast march of specialization in our profession. I have a hunch that specialists can never see the forest because of the trees. Specialized Bars such as tax, copyright, federal communications, interstate commerce seem to parallel those aspects of governmental affairs in which progress has been most delayed. The man who is familiar with all the details and obsessed with minutiae seldom is the type of person who has a leap of the mind, and I suggest that the leap of the mind—that glorious inexplicable leap—may be an essential ingredient of leadership in a youthful democracy. I don't think we can do away entirely with acute specialization. I am hopeful, however, that the leadership of the Bar will come from the non-specialists since specialists of necessity have a vested interest in the minute knowledge they have acquired. Emotionally and often unconsciously they oppose all change—for all those details which they learned would have to be unlearned. Moreover, the specialist has a fighting advantage because if someone has a new approach to any field of law the specialist puts up his mental dukes and points to Section 52-a(c)(3)(1), bewildering the proposer who is not familiar with every hyphen and comma in the existing legal mores of our nation. I've often felt that maybe society should be organized so that all young people would be specialists for the first ten years and then those who still have retained even a slight spark of mental imagination should be tapped by the elders of the Bar who in effect would say to these still-savable young souls, "Now you are fit to become a rounded, cultured human being—a full lawyer." Specialization in the law is cruel and probably has gone further than in most other fields of science, although not quite so far as the nose doctor who recently told me that he treats only the left nostril.

Isolation of Bar's Leaders Is Frightening

Of all the embarrassing steps taken which prevent the leaders of the Bar from becoming leaders of the people or even communicating law to the people, I suggest that the isolation of the leaders is the most frightening. The leaders of the Bar in most big communities have, in effect, announced that there are various inferior sectors of law—for which they have disdain. A person hit by an automobile has a

claim, is in a legal Hades in a sense and according to the prestige preference of most of the leaders must go to hellishly poor lawyers since the leaders of the Bar will not handle such a case. A name has been given to that Bar: the negligence Bar. It may well be that out of a sense of guilt for their failure to perform their "rounded" duties as lawyers, the leaders of the Bar every decade or so in the big cities call for a searching inquiry into alleged corrupted and unethical practices of members of the "negligence Bar". Everyone who practices in this field of law knows the art of protecting human rights against the injuries of prevalent torts. But surely corruption is never one-sided. The practices of the insurance companies, represented by the leaders of the Bar, are, as far as I know, far more shocking and antisocial than anything ever exposed in inquiries against even "negligence" lawyers who happen to represent human beings hit by automobiles. I've often said, partly in jest, that I should like to conduct with power of subpoena an inquiry into the casualty insurance company practices vis-à-vis injured people. It is no secret that bribes are given, that presents are given, that block-booking exists. It is no secret even to the leaders of the Bar who would not dirty their quill pens by representing any ordinary negligence-case defendant.

Then again is it not most difficult for the leaders of the Bar to hope to be leaders in a community where most of the citizens, as in New York City for example, have maybe their only contact with the court and with the process of law, in areas which the leaders never tread. To the general public it seems as if the leaders of the Bar pick only on the lawyers who represent the poor and indigent. Maybe the general citizenry at times ponders: "Surely the leaders of the Bar cannot be expected to ask for an inquiry into the behavior of their own clients, the casualty companies of America."

Such isolation from the run-of-the-mill cases of ordinary folk is also peculiarly apparent in the field of the protection of liberty. It has been said, with great truth, that in the big cities the leaders of the Bar have reduced the defense of freedom to three polite crimes: income tax violation by rich people in large amounts, SEC matters where there are fraud cases brought by our government, and antitrust matters. Beyond these three polite crimes the leaders of the Bar continue with few exceptions to speak of the "criminal Bar", thus creating an *infra dig* concept in the minds of the public.

One other area of public reaction does not give our profession a favorable climate for leadership. Maybe the public is bored and even cynical because of our exhortatory leaders. Never is an occasion missed for preaching the constitutional right of every person to counsel. Codes of ethics give lip-service to the doctrine. To be sure in all but a dozen or so metropolitan centers of population the lawyer represents all people—all causes from incest to incorporeal hereditaments. Save only during hastened changes in folkways—such as the present demands for lawyers in the battle for integration—the *local* non-metropolitan Bars do not ordinarily suffer from the snobberies of specialization or the fears of ostracism at the country club as in the metropolitan centers.

There is another phase of present trends which may have a bearing on the threatening loss of leadership of the Bar in our Republic. I refer to the conversion of our profession into a business. Surely, a fundamental revolution takes place when the profession of the law develops so that several score of law offices appear as conglomerations of fifty or one hundred, or even more, members of the Bar. Might not mere size, in Brandeisian terms, undercut the professional concept, particularly since the large offices, not entirely euphemistically known as "shops", represent clients who are the dominant portions of our industry and finance. I should imagine that a study would be in order to indicate, if I am correct, that the Gargantuan offices find that they do no better work, make less take-home pay after taxes, and practice with less excitement and fun than do the moderate-size offices. It may even be true that in historic terms, the moderate-size joint adventure of a few members of the Bar practicing their profession in non-belt fashion can "best" the big factories, since ingenuity may well be reduced by excessive size. Moreover it seems to me that there is a kind of wisdom in the country practitioner which does not appear prevalent in the big law firms. The country lawyer may understand our folkway and its needs in wiser fashion than does the senior partner in a firm of a hundred or more attorneys-at-law.

Morris L. Ernst has had a varied career in business, law and letters. A graduate of Williams College and New York Law School, he has practiced law in New York City since 1915. He has served as special counsel to the American Newspaper Guild; was the arbiter for Mayor LaGuardia in the 1934 taxicab strike in New York City; and served as personal representative for President Roosevelt on various wartime missions to England. Mr. Ernst was named "lawyer of the year" in 1960 by The Association of the Bar of the City of New York. He is the author of numerous books and articles on a wide range of subjects.

Best Lawyers Hard To Get in Large Cities

In the big centers the unpopular have tough going to get counsel. Of course some attorney—even if it be the able barristers of Legal Aid societies—pursues this pleasurable duty. Thus in the big cities by definition "an unpopular" can get counsel somehow, but he is by and large precluded from getting the best lawyer even if he can

pay the fee required. For also by definition the leaders of the Bar are the "best" lawyers and they are unpopularity-shy.

Forty years ago it was easy to approach and retain John W. Davis, in the post World War I hysteria case of a pacifist; Emory Buckner, in a pre-Norris-LaGuardia Act picketing case; or even Charles Evans Hughes in a cause representing John L. Lewis' mine workers' union against the employers. Today with the areas of supposed unpopularity expanded by the orthodoxies of McCarthyism it is tough going for a shop-lifter, nudist, alleged gangster, homosexual or whatever might be deemed unpopular at this moment of history. Of course each of the leaders no doubt has had his exception—his one unpopular case—treason, free speech or even Communist—but seldom does the same leader engage in several unpopular cases. Why then ought people believe that we lawyers truly believe in the right to counsel and the fundamental of our criminal law—the state must prove guilt—since innocence is presumed?

A study at the University of Pittsburgh Law School some years ago in connection with a Pittsburgh law review symposium relates a sorry tale. The timidity of law students as to representation of Communists (the unhappy example chosen) increased during each of the three years of legal education.

Observations at other law schools confirm this sad and invalid fear. And surely exhortation in clichés as to the great Right to Counsel creates only cynicism where the legal neophytes are not ignorant of the patterns of law life of the leaders of the Bar.

A few simple assays may help turn the tide. A study looking for the reason for avoidance of unpopular clients might well report that the declination does not arise from want of money—the leaders are tax collectors for Uncle Sam at 10 or 20 cents on the dollar. Nor is it lack of skills, for when they farm out the Infra Dig and Unpopular they could surely also attend at the Counsel Table. Thus would the near leaders hold up the leaders to prestige and the near leaders would then develop the courage to represent people who happen to be deemed unpopular.

The press, of course, with TV and radio, at present make it uncomfortable for the lawyer of an unpopular person. The identification between lawyer and client in most of our press is antisocial. And still I can understand the reluctance of presidents of bar associations meeting the TV and press owners to voice a protest as long as they themselves would have to speak with at least Freudian-suppressed apologetics. And so the vicious circle revolves until a new sense of leadership will arise.

In the meanwhile in the big cities absolution is bought with dollars—a not entirely blessed condition for man. The Legal Aid Societies—unneeded in our thousands of villages—seek funds to represent the victims of attacks by the sovereign on the unpopular or improvident. And we of the Bar rest at ease knowing that the Legal Aid Society retains lawyers better equipped than the leaders to perform such societal duties. For my part I should favor a ten-year program to make the Legal Aid Society no longer needed. Our friends the doctors practice like honorable Robin Hoods, billing the lucky and wealthy enough to carry a fair load of the unfortunate and unpopular.

Furthermore, the immediate social and moral escape of the leadership moves toward Public Defenders, as if the law were a gaming table, both sides of which to be financed by the government. Imagine what this will do in societal symbols to the concept of Right to Counsel—even if by some miracle the State will be as generous with money for defendant counsel as for prosecutor—not to mention the vast budgets of police and F.B.I.

The saddest of all indications of abandonment of leadership lies in our attitude toward youthful co-workers. As with other, of course, less essential groupings in our culture, older men and women die at their directorship chairs of hospitals, church councils and our multitudinous and highly valuable eleemosynary undertakings. Having unfortunately rejected all concepts of knighthoods in 1787, when as a child we had to be sure to demonstrate to the world that we did cut deeply into the umbilical cord, we now find honors hugged too highly and long by the aged—thus denying for all too long the new voices of the next generation. At the Bar such denigration of the young is peculiarly costly since I suspect that the great leaps of the mind in terms of law—as is the case in the hard sciences—is most likely to occur before the age of 35.

No one would doubt the conscious motives for the creation of separable but not quite equal powers for our "Juniors" in the American Bar Association. Surely the purpose was to induce more membership and a sort of comradeship of age groups. But unwittingly the division has needlessly isolated the old leaders from the full impact of the ideas of the younger graduates. The loss would be measurable in any survey by a social scientist. In our fast-moving economy and mores the newly educated are not yet specialists and have not as yet compromised their lives away as inevitably as is the case with us oldsters. We might recall that at the Constitutional Convention in Philadelphia in 1787, among the delegates six were under thirty years of age. Would our leaders today give six under thirty years of age the responsibility for revising even the by-laws of an association of lawyers?

All this may sound a bit on the gloomy side, but for my part I feel that all these tides can start to change if only one leader will arise to abandon exhortation and pompous preachments to the laity and talk with a speck of imagination. One leader with a bit of fire in his belly can let the people of our Republic know that our great profession does truly care—that we have a deep "concern" in the Quaker sense of the word, and that we can and intend to let the public know in simple words that without great advances in the realm of law man is lost and that only by a Bar of progress can we shift the resolution of problems from sit-ins, sit-downs, picket lines and mob demonstrations back into the quiet thoughtful calm chambers—known as courtrooms —where in quiet man has his best chance of finding Truth.

For Better or Worse?

Decisions Since *Haddock* v. *Haddock*

Perhaps in no field of the law has there been a greater change since the turn of the century than divorce. The Supreme Court's 1906 decision of *Haddock* v. *Haddock* came as a shock to the legal profession, Professor Foster reminds us, and there is hardly a law student in the country who is not aware of the impact of the *Williams* cases, decided in 1942 and 1945. Professor Foster is not sanguine about the prospects of ending the legal snarl that is now the law of divorce in these United States. Perhaps the best we can hope for, he says, is "ordered chaos".

by Henry H. Foster, Jr. • *Professor of Law at the University of Pittsburgh Law School*

When the sorcerer's apprentice overheard the magic word "*res*" and tried it out for himself, the automaton obeyed his commands, but the apprentice not having learned how to put the magic in reverse soon was knee-deep in doctrine. Moreover, the desperate measure of splitting the automaton in two (a patent misapplication of the precedent established by Solomon, J.) merely compounded the difficulty. Fortunately for the apprentice, Congress in the year 2000 came to his rescue and amended the Act of 1790. Thereafter the apprentice let the *res ipsa loquitur* and eschewed all magic.

THERE HAVE BEEN many apprentices and but few journeymen at work with that necromancy we call divorce jurisdiction. Over the years problems have multiplied and the solution of one urgent problem has engendered others. Such, perhaps, is inevitable, considering the diversified interests, values and objectives that must be served, and the judicial habit of pouring new wine into old bottles. On the one hand the law has sought to satisfy the divergent interests of the parties and the organized society of which they are a part, on the other our courts have suffered from a "hardening of the categories" in that they have persisted in following inapt analogies rather than daring to engage in functional creativity. In the United States the matter has been complicated by our federal system, the changing meaning of full faith and credit and our divergent attitudes towards divorce.

The first sorcerer's apprentice was the Englishman (or perhaps Roman) who based divorce jurisdiction upon domicile.[1] In England the ecclesiastical courts in matrimonial cases regarded only the domicile of the defendant, and their process was *in personam*.[2] In restless America, however, at an early stage the complainant's domicile became a proper forum for divorce jurisdiction exercised by legislatures or courts, and the mobility of the population and the problem of the deserted wife not only directed attention to the plaintiff's home forum but also gave rise to the proposition that the wife might acquire a domicile of her own apart from that of her husband.[3] The abandonment of the English unitary concept of domicile set the stage for a conflict between the laws of several jurisdictions and a consequent uncertainty as to marital status unless the Supreme Court would serve as the final arbiter. Aggravating this difficulty was the nebulous character of "domicile" and the inherent uncertainty of a term that depended upon the satisfaction of a mental element. More recently, we have split more hairs and have come up with divisible divorce and then divisible incidents of divorce. This may delight the nooscopic specialists we call "choice of law" men, but it is rather frustrating for the average practitioner.

Building upon Story's concept of domicile, Joel Bishop in 1852 started to formulate his "status" theory of marriage which in time jelled into the notion that the marriage was a *res* and that divorce was in the nature of an *in rem* proceeding.[4] Due to Bishop's prestige, the doctrine became widely accepted and it followed that the domicile of either husband or wife had jurisdiction to grant a valid divorce decree. Although the vast majority of states recognized *ex parte* divorces, a minority position was maintained in New York, Pennsylvania and the Carolinas, where, despite the language of the full faith and credit clause, foreign decrees were denied recognition if service had been by publication and

1. It is remarkable that the word *domicile* is not to be found in English law books from the time of Bracton down to Blackstone, although the foundations for the concept must go back to feudal times.

2. Jacobs and Goebel, CASES ON DOMESTIC RELATIONS (3d ed., 1952), page 399.

3. See Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951).

4. See Jacobs and Goebel, *op. cit.* at pages 401-402. See also reference to Bishop in *Williams* v. *North Carolina*, 317 U. S. 287, at page 297 (1942). Professor Overton in his article entitled *Sister State Divorces*, 22 TENN. L. REV. 891, at 895 (1953), points out that due to the early legislative divorces and the problem of deserted wives "a background grew up of granting divorces without having anything resembling *in personam* jurisdiction over both parties", and that the rule developed at an early date that jurisdiction for divorce might be rested upon domicile of one of the parties.

hence the foreign court lacked *in personam* jurisdiction over the local defendant.[5]

The Supreme Court in 1874 in *Thompson* v. *Whitman*,[6] departing from the tenor if not the holding of prior cases, permitted a collateral attack upon a sister state's judgment when there was a mere formal recital of jurisdiction. Full faith and credit need not be extended to such a decree. Subsequently this was extended to permit a free examination of jurisdictional facts as found by the first forum, even though the jurisdictional finding was not a mere formality and no defect was apparent upon the face of the record. In *Andrews* v. *Andrews*,[7] a South Dakota divorce of Massachusetts domicilaries, both of whom were subject to the personal jurisdiction of the South Dakota court, was held void as without jurisdiction.

The Supreme Court decision in *Haddock* v. *Haddock*[8] in 1906, came as a "shocker". Lawyers generally had taken it for granted that it was well established that the bona fide domicile of one party had jurisdiction to grant divorce although there was no personal jurisdiction over the respondent spouse. Mr. Justice White, speaking for a bare majority, distinguished both *Cheever* v. *Wilson*[9] and *Atherton* v. *Atherton*,[10] in effect rejected Bishop's *in rem* theory, and gave the Court's *qualified* blessing to the New York, Pennsylvania and Carolina minority position that full faith and credit need not be extended to an *ex parte* decree based upon constructive service. The qualification was that in such cases full faith and credit might be withheld if the husband had wrongfully left his wife and she was not to blame for the separation, if the *ex parte* decree was not that of the matrimonial domicile. This had the novel effect of making jurisdiction hinge on that fault which may be a grounds for divorce. The economic consequence of the case was that the first Mrs. Haddock could obtain a legal separation and alimony in New York when its courts acquired personal jurisdiction over him even though Mr. Haddock had a valid divorce in Connecticut and was there obligated to support his second wife.[11] The technical consequence of the decision was that Mr. Haddock was still married to the first Mrs. Haddock in New York, but lawfully married to the second Mrs. Haddock in Connecticut. The legal consequence was that due process and full faith and credit no longer jibed, and New York was free to dishonor the Connecticut decree at least as long as the first wife was not to blame for the separation and Connecticut was not the matrimonial domicile. Despite this permission, most states continued to extend recognition in the *Haddock* situation,[12] and New York itself did so when at the time of divorce the absentee spouse was domiciled in a state which as a matter of comity recognized such decrees.[13]

When the first *Williams*[14] case was decided in 1942, the divisible divorce and jurisdiction based upon fault notion of *Haddock* appeared to be headed for oblivion. The opinion by Mr. Justice Douglas expressly overruled *Haddock* and adopted the historic majority view that the domicile of one party had jurisdiction to grant an *ex parte* divorce that was entitled to recognition in sister states. Reasonable use of constructive service did not violate due process. The special significance of matrimonial domiciles was denied. Moreover, it was pointed out that it did not help matters to classify divorce as *in rem* or *in personam*, and that such actions were not purely one or the other. If this decision occasioned any enthusiasm in shopping centers for migratory divorce, such reaction was premature. *Williams II*[15] in 1945 held that, although the *ex parte* divorce decree of a sister state was prima facie entitled to full faith and credit, a second state was free to inquire into the jurisdictional fact of domicile, and if it reasonably found there was no bona fide domicile, it might withhold recognition. It was not altogether clear from the opinion whether North Carolina might reject the Nevada divorce because (1) it was not a party or privy to the case or (2) because the Nevada divorce was an *ex parte* proceeding without personal jurisdiction over the stay-at-homes, Mrs. Williams and Mr. Hendrix.

The events and decisions since *Williams II* indicate but do not prove that the absence of Mrs. Williams and Mr. Hendrix is the key to that decision and that the Supreme Court will give priority to the policy of conclusive finality and the stability of judgments only when both parties are before the divorce court; but where the divorce is *ex parte*, it will give precedence to the interests of the respondent and her state, although prima facie validity must be accorded to the sister state's judgment even in the latter case.[16] Thus the doctrine of *res adjudicata* has been absorbed into the constitutional requirement of full faith and credit. Put another way, jurisdictional facts are as much subject to *res adjudicata* as any other facts, and personal jurisdiction over the parties in most instances bars a collateral attack for lack of jurisdiction over the subject matter.[17]

Moreover, there has been a gradual extension or encroachment by the doctrine of *res adjudicata* as court dockets have become crowded and the tempo of modern life has been stepped up.

5. Perhaps the earliest case expressing the minority view is *Jackson* v. *Jackson*, 1 Johns. 424 (N. Y. 1806). See also *Colvin* v. *Reed*, 55 Pa. 375 (1867) [not followed in *Commonwealth* v. *Custer*, 145 Pa. Super. 535 (1941)] which is relied upon in the majority opinion in *Haddock*.

6. 18 Wall. 457 (1874).

7. 188 U. S. 14 (1903).

8. 201 U. S. 562 (1906).

9. 9 Wall. 108 (1869), holding that the new domicile of the wife might grant a divorce decree obligatory upon New York where the defendant husband personally appeared.

10. 181 U. S. 155 (1901), holding that New York must give full faith and credit to the divorce decree of the matrimonial domicile (Kentucky) even though service had been by publication.

11. It is ironic that from a purely economic point of view the *Haddock* case in a sense is reinstated by *Vanderbilt* v. *Vanderbilt*, 345 U. S. 416 (1957), in that in each case a valid foreign divorce did not extinguish the wife's right to support or alimony. However, the reasons for the similar result differ vastly, and the alimony obligation in *Vanderbilt* was based upon statute.

12. For example, see *Miller* v. *Miller*, 200 Iowa 1193, 206 N.W. 262 (1925).

13. *Dean* v. *Dean*, 241 N. Y. 240, 149 N.E. 844 (1925).

14. 317 U. S. 287 (1942).

15. 325 U. S. 226 (1945). Of all the many comments upon the *Williams* cases, the classic is that by Thomas Reed Powell, *And Repent at Leisure, An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Assunder*, 58 HARV. L. REV. 930 (1945).

16. *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948), *Johnson* v. *Muelberger*, 340 U. S. 581 (1951), and *Cook* v. *Cook*, 342 U. S. 126 (1951), in their holdings and by the language employed indicate but do not prove that North Carolina could not prosecute where the Nevada divorce was not *ex parte*.

17. See Note, 40 COL. L. REV. 1006 (1940); *Baldwin* v. *Iowa Assn.*, 283 U. S. 522 (1931); *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932); *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25 (1917); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940); and Paulsen, *Migratory Divorces*, 24 IND. L. J. 25 (1948).

In its early form, *res adjudicata* was effected where there had been an actual litigation of the facts. Next it was extended in some states to facts that were within the pleadings or issues of the case. Finally, within recent years, the Supreme Court has taken the lead in extending the doctrine to cases where there was personal jurisdiction over both parties and the issue could have been litigated but was not.[18] The court applied these notions of *res adjudicata* to jurisdictional as well as other facts and in the *Davis* case,[19] *Sherrer* v. *Sherrer*,[20] and *Coe* v. *Coe*,[21] the "bootstrap" doctrine precluded the collateral attack upon a sister state's divorce decree that had been permitted in such cases as *Andrews* v. *Andrews*.[22] Theoretically, the second state, due to the language of the Statute of 1790,[23] did not have to give greater *res adjudicata* effect to the decree of the first state than the latter accorded it, but in practice the Court seems to assume that the state of rendition follows the broadest rule as to *res adjudicata*.[24]

The practical result of these cases was that a divorce decree granted by a court that had personal jurisdiction over the respondent as well as the complainant was unimpeachable and must be given full faith and credit. Only the *ex parte* decree remained vulnerable if anyone cared to question it. Although the Supreme Court has not again had the *Williams* situation, the odds are that a criminal prosecution for bigamous cohabitation or adultery will be barred where all four parties go to Nevada, and perhaps where the cuckolded partners stay at home but enter an appearance through counsel,[25] although Mr. Justice Frankfurter's naïve idea that Nevada must be the *true* domicile[26] might find some takers, or Mr. Justice Murphy's ingenuous thought that Nevada itself is "hoodwinked" or defrauded where domicile is a sham, might be taken seriously.[27] A spot check of the decisions since the *Williams* cases indicates that as a practical matter *ex parte* judgments are rarely disturbed and that almost no criminal prosecutions have occurred. In the relatively few cases where the validity of a sister state's *ex parte* divorce has been challenged, however, the majority have held the *ex parte* decree was without jurisdiction. Over 90 per cent of such cases have been actions where the stay-at-home spouse was seeking to impose or enforce the duty to support, and a few cases have involved workmen's compensation claims or wrongful death actions.[28]

In addition to the package of *res adjudicata* and full faith and credit that is obligatory where there is personal jurisdiction over both parties, so-called estoppel may bar a collateral attack, whether the decree was *ex parte* or not, in those states which voluntarily adopt some of its many forms.[29] Thus, procurement of the divorce decree, remarriage in reliance upon its validity (by either party), acceptance of a property settlement, financing the procurement of the decree and like conduct, may bar subsequent collateral attacks in some states, as may laches or lapse of time. In this connection, there would appear to be no valid constitutional objection to what in effect would be a curative act or statute of limitations which barred all collateral

Henry H. Foster, Jr., is a graduate of the University of Nebraska (A.B. 1933, LL.B. *cum laude* 1936) and has done graduate work at the Harvard Law School (LL.M. 1941) and the University of Chicago (LL.M. 1960). He is the principal draftsman of a model Code for Marriage and Divorce Law, is chairman of the Family Law Section's Committee on Matrimonial Actions and has served as chairman of the Child Custody Committee and of the sub-committee on the Substantive Law of Divorce. He became Professor of Law at the University of Pittsburgh in 1954.

18. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940), is the leading case. It should be noted that the Supreme Court has been careful to refrain from expressing the full faith and credit obligation in inexorable terms and has consistently stated that there may be some local policies strong enough to justify non-recognition of a sister state's valid decree. However, as pointed out by Mr. Justice Frankfurter in *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416 (1957) such instances have been few and far between, apart from *Haddock* v. *Haddock*.

19. 305 U. S. 32 (1938), where the respondent spouse appeared and fully litigated the jurisdictional issue of complainant's domicile.

20. 334 U. S. 343 (1948), where the respondent spouse entered a general appearance and contested the custody award but did not question jurisdiction.

21. 334 U. S. 378 (1948) (companion case to *Sherrer*), where the respondent spouse appeared in person and filed a cross-complaint for divorce and an answer which admitted comolainant's domicile in Nevada. *Cheever* v. *Wilson*, 9 Wall. 108 (1869) is substantially similar on facts.

22. 188 U. S. 14 (1903). See also *Bell* v. *Bell*, 181 U. S. 175 (1901), and *Streitwolf* v. *Streitwolf*, 181 U. S. 179 (1901), holding that the domicile of neither has jurisdiction to divorce and its decree is void and subject to collateral attack.

23. Article IV, Section 1 of the Constitution. The Statute of 1790 (28 U.S.C. Sec. 687) provides: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by Law or usage in the courts of the State from which they are taken."

24. See for example *Cook* v. *Cook*, 342 U. S. 126 (1951).

25. Paulsen, *op. cit.* at pages 36-37 expresses a word of caution about the efficacy of an appearance by counsel only and points out that *Sherrer* and *Coe* involved more than that since the attacking parties were present and participating. Dean Griswold, *op. cit.* at page 217 speculates about the presence of active as distinguished from passive fraud on the court and says the result remains to be seen. The classic case on affirmative or active fraud on the court, of course, is *Holt* v. *Holt*, 64 App. D.C. 280, 77 F. 2d 538 (1935), where Judge Hitz in holding that collusion invalidated a Nevada divorce decree uttered the immortal words: ". . . we assume that even in that forward-looking jurisdiction parties to a cause of divorce may not litigate by day and copulate by night, *inter sese et pendente lite*."

26. See dissent in *Sherrer*, 334 U. S. at 356, and also majority opinion in *Williams II*, 325 U. S. at 238.

27. See concurring opinion in *Williams II*, 325 U. S. at 242. Of course, as pointed out by Mr. Justice Douglas in *Williams I*, 317 U. S. at 298, Nevada itself purports to base jurisdiction to divorce on the bona fide domicile of at least one party. See *Latterner* v. *Latterner*, 51 Nev. 285, 274 P. 194 (1929). However, the perfunctory character of jurisdictional testimony is shown by the actual record in the *Williams* case. See Powell, *op. cit.* at 945.

28. This information is based upon a hurried check by a student assistant who read the headnotes in some 800-1000 cases listed in Shepard's Citations as citing the *Williams* cases. The student reports that he found only eighty-eight cases where a sister state's *ex parte* decree was collaterally attacked (there being no estoppel), that in fifty-six instances the *ex parte* decree was denied recognition, and in thirty-two cases it was held to be valid. The only criminal prosecution comparable to that in *Williams* that was found was *Reed* v. *Texas* (Tex. 1945) 187 S.W. 2d 662, although there were some involving Mexican divorces.

29. See Comment, 61 HARV. L. REV. 326 (1948), and Annot. 109 A.L.R. 1018. For the peculiar New York doctrine, see Comment, 18 N. Y. U. L. Q. REV. 94 (1940).

attacks after a specified length of time since the same considerations of policy which justify such statutes for other matters should apply *a fortiorari* in this area where finality may be even more important.

From the standpoint of innovation, perhaps the most interesting result of this series of cases is that as in the *John L. Lewis* case,[30] "void" no longer means "void". Mr. Justice Field's classic language about the "voidness" and "nullity" of null and void has become a museum piece.[31] Collateral attacks on all void decrees no longer are allowed. *Res adjudicata* may bar parties and their privies and what has vaguely been described as a "lack of a pre-existing interest" may bar others, including children as in *Johnson* v. *Muelberger*,[32] a second husband as in *Cook* v. *Cook*,[33] and as previously stated, possibly even the state as well. Technically, the decree may be void, but if no one may question it, it is an academic void.

From what has been said we may glean that some aspects of *Haddock* have remarkable vitality despite the interment by *Williams I*. For in *Williams II* Mr. Justice Frankfurter following Mr. Justice White in *Haddock*, did not dispute the validity of the foreign *ex parte* decree in the state of rendition. As pointed out in the dissenting opinion of Mr. Justice Black, this meant that divisible divorce was still possible despite *Williams I*, *i.e.*, Mr. Williams and the former Mrs. Hendrix were man and wife so far as Nevada was concerned, but their relationship could be regarded as meretricious by North Carolina.

If the problem of choosing between faith and credit to Nevada or North Carolina should arise, under applicable decisions a third state presumably would have to recognize the latter of two inconsistent decisions, and this may be so even though the second state disregarded its constitutional obligation to give full faith and credit to the first state's judgment.[34] Such is really using bootstraps for a launching pad! The second aspect of *Haddock* that survives is the economic consequence of that decision.

Although the *Williams* cases place *ex parte* divorces on a firmer footing than that which existed under *Haddock*, finality is accorded only to some of the incidents of marriage and divorce. Personal jurisdiction over, and the domicile of, one spouse is not sufficient to terminate the "personal rights" of the other non-resident spouse. *Estin* v. *Estin*,[35] permitted New York to treat a prior support order as unaffected by a valid *ex parte* divorce, and *Vanderbilt* v. *Vanderbilt*,[36] upheld New York's application of its statute to grant alimony after a valid *ex parte* foreign divorce. In addition to the wife's right to support or alimony, her right to custody of children also is an incident that may not be cut off without personal jurisdiction over her, as was established by the questionable decision in *May* v. *Anderson*.[37] The net result is that today, in the *Williams II* situation, we have the possibility of divisible divorce, and in the case of support and child custody, divisible incidents as well. In the field of divorce law we certainly are not "one nation indivisible".

The Supreme Court's insistence upon personal jurisdiction over the respondent spouse before there is power to terminate the economic incident and interest in custody is especially interesting when contrasted with recent inroads it has made with reference to *Pennoyer* v. *Neff*.[38] Reasonableness of the nexus or connecting factor between forum and the parties rather than power to enforce an order has been the modern test of jurisdiction.[39] Yet Mr. Justice Black in *Vanderbilt* hark-ened back to the power concept and cited *Pennoyer* v. *Neff* with approval, instead of pointing to the unreasonableness of the Nevada court's action in cutting off alimony in an *ex parte* action. Presumably he would have held the same way if California (the matrimonial domicile) rather than Nevada had been the divorcing state, despite the possible analogy to non-resident motor vehicle statutes.

Furthermore, although the Supreme Court has not given a blanket endorsement to constructive service in divorce cases under any and all circumstances, it would seem that a critical examination as in *Mullane* v. *Central Hanover Bank and Trust Co.*,[40] might lead to a finding that there had been a denial of procedural due process where something better than service by publication was available. In this day and age, service by publication should be the last resort when other methods fail, and at least some effort to bring home actual notification should be required.

In the light of the many problems we have sketched in a cursory way, what of the future? With trepidation in assuming the unfamiliar role of constructive critic, two or three of many possible placebos may be ventured. The imprecision of the concept of domicile and the vulnerability of *ex parte* proceedings seem to be focal points in our problem. By Supreme Court decision or act of Congress, divorce jurisdiction might be limited exclusively to the matrimonial domicile (where they last lived as man and

30. *United States* v. *United Mine Workers*, 330 U. S. 258, at 309-310 (1937) where Mr. Justice Frankfurter in his concurring opinion expressed his doctrine of the "void but non-frivolous order" which must be obeyed.

31. *Norton* v. *Shelby County*, 118 U. S. 425, at 442 (1886).

32. 340 U. S. 581 (1951). With reference to the *Johnson* and *Cook* cases, Overton, *op. cit.* at 908 comments, "We are now perilously close to a rule that when the state court has jurisdiction over both parties the divorce is valid and entitled to full faith and credit against everyone, and if the state rendering the decree wishes to bind the whole world it may effectively do so. If this is the result of the *Johnson* and the *Cook* cases, it seems that while denying it, the court is treating a divorce as an *in rem* decree, at least in operation." Professor Overton also points out that *Johnson* was inconsistent with all prior decisions and contrary to the RESTATEMENT, JUDGMENTS §93, Comment C (1942), which provides that third persons need not recognize void judgments.

33. 342 U. S. 126 (1951).

34. *Treines* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939), and *Sutton* v. *Lieb*, 342 U. S. 402 (1952). These cases indicate that if a state improperly refuses to extend full faith and credit to the prior final decree of a sister state and no appeal is taken therefrom, such erroneous decision itself becomes *res adjudicata*, and a third state must honor such erroneous decision.

35. 334 U. S. 541 (1948).

36. 354 U. S. 265 (1957). See Comment, 43 CORN. L. Q. 265 (1957) for a discussion of the limitations on the application of Sec. 1170-b of the N. Y. Civ. Prac. Act.

37. 345 U. S. 528 (1953). The result reached by the majority is hard to justify on the basis advanced in Mr. Justice Burton's opinion, although if it had been based upon the proposition that a court awarding custody must have the children physically present in order to have jurisdiction, it might be a sound result.

38. 95 U. S. 714 (1877). See, for example, *Traveler's Health Assn.* v. *Virginia*, 339 U. S. 643 (1950); *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437 (1952), and *McGee* v. *International Life Ins. Co.*, 335 U. S. 220 (1957). Compare, *Hanson* v. *Denckla*, 357 U. S. 235 (1958), comment by A. W. Scott, 72 HARV. L. REV. 695 (1959). All of these cases are discussed in an excellent article by Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 8 U. CHI. L. SCH. REC. 65 (Spec. Supp.) (1958).

39. See Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427 (1929). But see Kurland's criticism, *op. cit.* at page 86.

40. 339 U. S. 306 (1950).

wife), no other state having such jurisdiction.[41] Deserters or nomads would be forced to return to the home port if they wanted a divorce and the deserted spouse could obtain a decree that would be personally binding on the absentee on the basis of analogy to non-resident motor vehicle statutes or other situations involving jurisdiction due to an act or consent in advance. The obvious objection to such a rule is that it would run divorce mills out of business and occasion inconvenience to peripatetic spouses in an age when *personae mobilium sequuntur* seems to be the motto.

The second possibility would be to follow the lead of recent English legislation[42] and by Supreme Court decision or act of Congress make actual residence for a given time before suit, rather than domicile, the jurisdictional basis for divorce as already purports to be the case according to the literal language of most state statutes, full faith and credit being obligatory in all cases insofar as termination of the marital status was concerned.[43] Such a rule or act, by itself, perhaps would not eliminate the divisible incidents of divorce problems involved in the *Vanderbilt* and *May* cases, unless the Supreme Court had a change of heart. However, if a state following the pattern of the Uniform Enforcement of Support Act established a procedure whereby the non-resident might be compelled to respond by testimony or deposition in another state, such being forwarded to the divorcing jurisdiction, even the divisible incident problem might be solved. Where the absentee could not be located, the complainant might have to be satisfied with a divorce decree alone. Jurisdiction based upon actual residence, or a conclusive presumption of domicile if actual residence for a given period was made out, would be an improvement but no panacea. If the federally specified time was too long, the impetuous or the acute victims of the bonds of acrimony would have their agony prolonged. We brush aside as undesirable and impractical, at least at this time, proposals for a federal marriage and divorce law administered by the federal courts.[44]

The chances are that none of these or other currently proposed remedies will be adopted. Masochism in the modern man, our ambivalence towards marriage and divorce law, the lawyer's love of the traditional and the intricate, and the diversity of policies and interests involved, all make it difficult if not impossible to adapt divorce law to current needs. We may have to learn how to live with our ulcer. Moreover, perhaps diversity, uncertainty and divisible incidents are not bad *per se* in a pluralistic society and in a federated system. What we want, perhaps, is ordered chaos. Certainly we must compromise as to some things. We cannot have complete uniformity and certainty as to marriage status and at the same time give a state full power to deal with the status of its domiciliaries.[45] What our Supreme Court has done, before and since *Haddock* v. *Haddock*, is to try to effect a workable compromise between the legitimate concern of a state regarding its citizens and the often inconsistent value of uniformity and certainty which is an authentic claim advanced by the parties themselves. Through the years the point of compromise has differed, but if we look behind the decisions we shall see competing values at work. Today, uniformity and certainty prevail, sometimes at the expense of the interest of some state, where the divorce court has jurisdiction over both parties, and the ghost of *Haddock* v. *Haddock* may be faintly discerned when the proceedings are *ex parte* and neither value has gained complete supremacy. To return to our sorcerer's apprentice, by the year 2000 our population may have so increased and our courts may be so busy, and euphoria pills may be so wonderful, that our political parties will join in sponsoring the repeal of the Act of 1790 or amending it so that it provides that "full faith and credit shall be given in each state to all final judgments of sister states". Period.[46]

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41. Mr. Justice Douglas' summary rejection of the special significance of the matrimonial domicile in *Williams I* might be limited to the context of *Haddock*, and further thought about the matter might lead to the conclusion that generally speaking of all possible jurisdictions that have some contact with the parties, that of the matrimonial domicile is usually the most substantial and reasonable.

42. See the Matrimonial Causes Act, 1950 (14 Geo. 6, C. 25, Sec. 18).

43. See Griswold, *op. cit.* at 210-214 for a comparison of English and American law.

44. Various statutes have been introduced in Congress to cope with migratory divorce and full faith and credit problem, dating back to 1884. See Franklin, 1 OKLA. L. REV. 151 (1948). The consistent failure to enact a federal law on the subject (assuming such to be constitutional on some basis) indicates that Congress is willing to let the Supreme Court wrestle with the divorce problem. See also Mayers, *Migratory Divorce—A Proposed Federal Remedy*, 54 COL. L. REV. 54 (1954), where the author argues that where husband and wife are in different states divorce may be regarded as a "controversy" within the federal power under Article III, and that the diversity of citizenship lays the ground for either exclusive or concurrent federal court jurisdictions, and a statute so providing would be constitutional despite the dicta in *Barber* v. *Barber*, 21 How. 582, 584 (1858).

45. Overton, *op. cit.* at 894.

46. Naturally, this is the substance of Article IV, Section 1 of the Constitution, minus the last sentence. A return to the pre-*Thompson* v. *Whitman* (1874) days might be the lesser of the two evils.

Lawyers' Incomes and Professional Economics

For some time there has been disagreement among members of the Bar as to whether or not the profession is overcrowded. Some argue that the complexity of modern society requires more lawyers than ever before, while others point to the decline in lawyers' incomes over the past few decades as evidence of overcrowding. Mr. Schlossberg declares that both sides are correct: the need for privately employed lawyers is on the decline, he says, but the need for lawyers in public and quasi-public employment is soaring. He urges the organized Bar and the law schools to take note of this change.

by Arnold Schlossberg • *of the West Virginia Bar (Charleston)*

THE LEGAL PROFESSION exists to serve the community, but it cannot do so properly unless it is itself healthy; and the profession is not healthy when it lacks a sound economic base. Lawyers generally were shocked early this year by the report of the U.S. Treasury in Publication No. 438 setting forth figures for the 1957 incomes of all practicing lawyers. The Treasury figures showed that about 7 per cent of all lawyers in individual practice actually lost money. And of those who had any net profit before income taxes, 53.75 per cent had net incomes before taxes of less than $5,000 for the year 1957. This would appear to place the median incomes of all lawyers in individual or solo practice well below $5,000 per year for the year 1957. The figures for the partnerships were given by firms only and did not disclose the number of partners in each firm. It would thus be difficult to break down the incomes of the individual partners; however, it would appear fair to say from the tables issued by the Treasury Department that certainly one third of all partners in law partnerships made very little more than $5,000 per year during the year 1957.

All of this disturbing information on incomes has renewed the perennial debate as to whether or not the profession is overcrowded. On the one hand, we have the leaders of the Bar and many of our distinguished legal educators asserting that the profession is not overcrowded and that we need more of our best young men as recruits in the profession to meet the needs of the public. On the other hand, we have many active and experienced private practitioners who say that the Bar is not only overcrowded, but seriously overcrowded, and that this overcrowding is hampering it in the discharge of its functions to the public. These practitioners now point to these Treasury figures on median earnings as conclusive support for their position. Bar leaders admit the facts regarding low income in private practice, but deny that this is evidence of overcrowding and contend that lawyers can remedy their admittedly inadequate professional incomes by adopting more efficient methods.

Now this is not just an academic question. If the profession is really seriously overcrowded, then we have a duty so to advise prospective law students. On the contrary if the profession is not overcrowded, then we can conscientiously encourage our best young men to enter the study of law.

When the Treasury Department figures were summarized in the *Virginia Bar News*, Professor Hardy C. Dillard, of the University of Virginia Law School, Editor of the *News*, carefully pointed out that these figures represented the incomes of lawyers in private practice only. That is the key to the situation. The figures do not include the incomes of the many lawyers trying cases for the Treasury Department, serving in the Internal Revenue Service, serving in the Justice Department, the Federal Trade Commission, the National Labor Relations Board, in the legal departments of our many great corporations, or serving as Judge Advocates in the Army, Navy or Air Force, or as civilian attorneys in our huge defense establishment, not to mention the important administrative work done by lawyers, or their many positions of leadership in the business world. Thinking of the subject in this way we can reconcile these various points of view.

Both Sides Are Right on Overcrowding

Both parties to the controversy on overcrowding are right, strange as this may seem. The law teachers and leaders of the Bar are correct in saying that there is a greater need for legally trained persons than ever before in our history. The growing complexity of our society and the vast new fields of taxation, labor relations, and now of space law, brought on by our atomic age,

require the services of more and more well-trained lawyers. Opportunities for young men with sound legal training are greater today than ever before in our history. But these opportunities are not in private practice, which is overcrowded; but rather in these new institutionalized agencies. The reason is that while the over-all need for legal services has increased, the legal needs of the public are being met mainly by private corporations and new enterprises, and the many public agencies which were unknown a generation ago.

In studying the legal career of Abraham Lincoln, one is struck by the many libel and slander suits which were brought in the Circuit Courts of Illinois during Lincoln's day. How many lawyers today try libel and slander suits? The fact is that, apart from criminal work and the automobile accident cases, it appears that there has been a decline in private litigation. Individuals resort less often to lawyers, while organizations, corporations, unions and governments resort more and more to lawyers to guide them in their activities.

What we have, then, is an unfortunate imbalance in our profession. As lawyers, we have been slow to recognize the changing character of our nation and its economic life. Take as an illustration the retail grocery business. Certainly no one will assert that there is less retail grocery business in the United States today than fifty years ago, but there certainly are fewer enterprises in the retail grocery business. As a matter of fact, practically all of this business has now gravitated to the large chain grocery corporations. Whereas fifty years ago, there were a hundred individuals operating grocery stores, each having his own lawyer, we now have one chain corporation with thirty or forty, or maybe even as few as twenty, outlets doing considerably more business than the one hundred individual stores did formerly.

Instead of needing numerous individual practitioners to meet its legal requirements, this chain corporation now has a single law firm with two or three lawyers attending to all of its problems, plus a lawyer or two on its own staff. But that is not the whole story. The chain store is only one of the developments of our modern life. There are tax laws, labor laws, pure food and drug laws, fair trade laws. All of these are administered by regulatory agencies of government which employ lawyers to attend to the public aspects of the chain store's operations. Hence, there is a great deal of work for lawyers in public employment that did not exist before. Including the attorneys on the public payrolls, there are a large number of lawyers dealing with problems arising from the operations of the chain corporations. On the balance, it is submitted that modern developments have created more legal work in the aggregate, but there is less legal work for the individual private practitioner than there used to be.

The Profession Has Not Adjusted to the Change

The important point is that the profession has not adjusted itself properly to this situation, and our law school graduates are not always guided properly in their career choices, so that the present imbalance in the profession continues to be perpetuated. This imbalance adversely affects both the public and the profession itself. First, the neglect by the Bar of the newer administrative fields in which legal activities are now performed has definitely served to keep many of our law graduates away from this work. This has resulted in a vacuum that lay persons have been only too glad to fill. Think of the number of lay firms engaged in labor relations work, for instance—to the detriment of the public and our profession.

We must also realize that certain phases of legal counseling have taken on new forms that are not compatible with traditional law practice. But there is no reason why law teaching should not adapt itself to the situation. Take, for example, the whole subject of estate planning. A realistic look at this field must inevitably lead to the conclusion that the bulk of this work is now being done by insurance agents and trust companies. The belated attempt to keep this out of the hands of laymen by unauthorized practice of law committees has not proved effective. The plain truth is that young law graduates who are interested in working with people on financial matters, planning their estates, and advising on handling of property, may well have to consider operating as estate consultants with insurance licenses so that they may sell life insurance and annuities in connection with their estate planning, or as salaried trust officers of banks. But older lawyers will say that this means becoming an insurance agent or a banker, and not a lawyer. Nevertheless, we must give thought to the fact that this work, to be properly performed, requires a sound and thorough legal background. The fact that those now doing this work do not possess such a background is far from persuasive that it is unnecessary, and we must face up to the fact that if our law graduates elect to enter this field, they may forgo the opportunity to engage in other practice, since this field is largely financed or supported by insurance commissions or salaries rather than by the conventional legal fee.

Laymen Can Be Competent in Performing Legal Service

As far as the public is concerned, it is not going back to the old situation of paying a large fee for planning the average estate, when it can get what it considers to be the same service from an insurance agent or bank who says that there will be no charge and merely asks the privilege of selling insurance or handling an estate. And it should be borne in mind that when these laymen perform legal services long enough, they become fairly competent and efficient, at least in a narrow technical sense. Such people, of course, lack the broad background that the properly trained lawyer could bring to this work which would be of great benefit to the public. But we should not dismiss this work by lay people as being uniformly incompetent, because most of it is not. Once laymen are allowed to get into a particular segment of the law, they will become good technicians. Only the broad judgment based on legal training is missing. We probably cannot reverse this development because it has gone too far and the laymen have acquired too much of a vested interest. Moreover, it is doubtful if lawyers could render the type service that the public wants in this field on a conven-

tional law office practice basis. This field is only mentioned by way of illustration as one that should be manned more and more by lawyers or law graduates.

Similarly, the trust departments of our banks have taken over considerable work formerly done by private practitioners. Maybe some lawyers cherish the notion that we can regain this lost work for the private practitioner. It is hard to be optimistic about such a goal. As with insurance and estate planning, it is submitted that the trend of letting laymen do trust work has gone much too far to be reversed. Whether we like these developments or not, we must either adjust to them by furnishing legally trained personnel for these occupations or let the public suffer from the rendering of services by people not fully trained, and furthermore deny our law graduates the opportunities to work in these fields.

If our young law graduates who wish to work in these fields are not encouraged to adjust to the new ways in which they will have to perform their services, the public will suffer along with our law schools and the profession itself. Instances will also come to mind of many areas of activity in our daily life that are performed by corporations—from title work to tax counselling. Our law graduates must be frankly told that this is an age of organizations and organization men, and if they wish to work in certain fields, they may find it necessary and proper to become salaried employees of the corporations that operate in these fields, or of government agencies. Thus we see that the first adverse effect of this imbalance is that our law graduates are not seeking nor getting their proper share of career opportunities, particularly in the newer fields that involve the application of the newly emerging branches of law. As a result, the public is not getting the highest possible service.

The other and even more serious adverse effect of this imbalance is the serious overcrowding in traditional and conventional private practice. But bar presidents in many states and many law teachers protest that there is no overcrowding, even in private practice. They insist that low earnings do not mean that the Bar is overcrowded, but are the result of various factors that can be remedied. If inadequate earnings by a majority of private practitioners are not a clear case of *res ipsa loquitur* on this issue, then no additional argument would be more persuasive. Let us, however, turn to the common remedies for inadequate earnings.

When bar presidents and others say that the profession can remedy these unsatisfactory earnings conditions, what remedies are being proposed? First, lawyers are advised to modernize their offices and make them more efficient by using modern devices —electric typewriters, dictating machines, electric adding machines, etc.; second, there is a renewed emphasis on the keeping of time records for the purpose of office cost accounting and billing of clients; and third, there is the suggested increase in the minimum fee schedules in the various bar associations and the devising of ways and means whereby these minimum fee schedules can be more rigidly enforced. Finally, there is the remedy proposed by Reginald Heber Smith in the *American Bar Association Journal* of September, 1960: If the lawyers in large firms are making so much more money than individual practitioners, then all we have to do to increase our incomes is for all of us who are individual practitioners to band together into large firms and we shall thereby become large earners.

Now what about these various remedies? Consider them in reverse order. With all due respect, it is submitted that Mr. Smith fails to realize how successful law firms are formed. Firms of any solidity and permanence are not easily formed; they come into being primarily because an outstanding practitioner or public figure acquires important legal work, or a greater volume of legal work than he as an individual can properly attend to; he therefore associates himself with other attorneys whom he considers competent to share this additional business with him. Business creates the firm, rather than the reverse. A few young firms, which have arisen more or less spontaneously, seem to be doing fairly well, but, as a general proposition, if

Arnold Schlossberg is a graduate of the Harvard Law School (LL.B. 1933). He practices law in Roanoke, Virginia, and is a member of the New York and West Virginia Bars.

five lawyers without any strong backing or flow of practice band together into a firm and combine all their little cases, the only result is confusion and hodge-podge, and very little is added to the income of any one of them. Of course, there is a modest saving when lawyers share reception rooms and books and equipment, and that is a highly desirable thing, but it has very limited significance. It certainly is not going to create large earnings for an attorney who has insufficient practice.

The same comment is applicable to these other suggestions. Keeping accurate time records has always been important with the very large firms having large corporate retainers, or that engage in important litigation over the years in which numerous attorneys participate. It becomes an absolute necessity to keep such records in order to know where the firm stands. It is further true that the small firm, and even the individual practitioner, can profit from keeping time records in certain types of cases, and it certainly will rationalize and assist him in preparing his bills, and possibly increase income slightly by justifying larger bills. But there must be important work before time records are going to mean very much. Small cases do not require any complicated time rec-

ords or accounting systems. The same thing is true about suggestions for mechanical efficiency in offices. The use of modern devices is helpful and will save some time and expense. However, here again, there must be important work to justify expensive equipment. It is tragic to see a lawyer, particularly a young lawyer, spend a lot of money for some valuable piece of equipment which is only used infrequently and gathers dust.

Now finally we come to the perennial favorite device of the bar associations. If lawyers are not making enough money, then they must raise prices, increase legal fees. Well, frankly, we ought to raise fees on many items in the field of law. The public can afford to pay more, and should pay more, for a great number of services; but it is not going to pay more as long as there are several lawyers competing for each piece of business. If, as a recent Illinois study showed, most lawyers consider themselves as having inadequate practice, then it is a pointless endeavor to try to raise fees and make such raises stick. If the supply exceeds the demand, you can no more raise rates than you can make water run uphill. It is a worthy endeavor, but it will hardly accomplish the purpose intended.

This overcrowding in private practice leads to a number of unfortunate results. First of all, it detracts from the dignity and importance of the profession. Second, it is diluting and blunting professional competence by forcing lawyers to do non-professional tasks. Lawyers are doing their own typing and other menial activities instead of developing professional competence. Third, the growth of a healthy specialization has been delayed. Efficient service requires reasonable specialization, at least within several related fields, if not in a single field. Yet many individual practitioners are unable to specialize because they feel they have to take whatever comes along. This is inefficient for them and inefficient for the public. Other disadvantages to an overcrowded, inadequately paid profession could easily be cited by other practitioners. When lawyers are not busy, especially younger lawyers, they are not receiving extensive experience in actual practice which is necessary to perfect skills. Compare experience in law practice with the medical profession, which seems to keep all doctors as busy as they wish to be.

In conclusion, it is urged that the profession and the law schools should intensify their studies in the field of legal economics. This is of significant importance to the public, as well as to the profession. Only by further careful studies of this problem can the profession intelligently adjust itself to modern developments, to the great advantage of the general public, and to the best interests of the profession as a whole, and particularly our younger members.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1962 Annual Meeting and ending at the adjournment of the 1965 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

A State Delegate will be elected in New York to fill the vacancy for the term ending at the adjournment of the 1964 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1962 must be filed with the Board of Elections not later than March 9, 1962. Petitions received too late for publication in the March issue of the *Journal* (deadline for receipt February 1) cannot be published prior to distribution of ballots, which will take place on or about March 19, 1962.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 9, 1962.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held not later than fifteen days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
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The Public Interest: Government Patent Policy and Equity

In our July number, we published two articles setting forth opposing points of view on the question who should own the patent rights on inventions produced on projects financed by the Federal Government. Congressman Emilio Q. Daddario favored a flexible position, holding for the Government the rights it needs, but taking title by the Government only when public policy or the national security dictated. Senator Russell B. Long argued for Government ownership. In this article, Mr. Lawlor advocates a third policy which he calls the "fair compensation" theory.

by Reed C. Lawlor • *of the California Bar (Los Angeles)*

TWO THEORIES respecting government patent policy have been aired widely. One is the so-called title theory. Another is the so-called license theory. These theories have recently been described by Senator Russell B. Long[1] and Congressman Emilio Q. Daddario[2] in the *American Bar Association Journal*. The arguments presented by Senator Long and Congressman Daddario in those articles proceed on the assumption that one or the other theory is correct. It is submitted that neither theory is correct; neither theory is in the public interest; and neither theory leads to equitable results.

There is a third theory. This is the "fair compensation" theory. The principle of the fair compensation theory is that the Government should pay reasonable compensation for the use of any invention whether it be developed under a Government contract or otherwise.[3] The Government should receive what it pays for. But the Government should pay for what it gets. Unless fair compensation is paid by the Government for inventions developed for Government use, there will be delay in making inventions needed for Government purposes and the public will suffer.

The fair compensation theory has almost been forgotten and has been largely ignored. Without doubt, the advocates of the title theory say that the title theory is fair. Also, without doubt, the advocates of the license theory believe that the license theory is fair. It is submitted that neither the title theory nor the license theory is fair to contractors or to the general public.

In this short article only a few of the points in support of the fair compensation theory are explained.

Statutory Needs

Some readers may not be familiar with the background to which the so-called title theory and license theory apply. The question at issue is: what rights, if any, should the Government acquire *as a matter of law* in inventions and patents that are developed by Government contractors? This issue arises primarily with reference to contractors who enter into research and development contracts with Government agencies, but it also arises in connection with contractors who enter into production contracts. The title theorists, for whom Senator Long speaks, take the position that there should be a law requiring anyone who enters into a research and development contract with any Government agency to assign all inventions made in the course of the contract to the Government agency. The Patent Sections of the Atomic Energy Act and the National Aeronautics and Space Act are examples of that theory. Both acts incorporate provisions of the type sought under the title theory.

In order to correct the errors in philosophy incorporated in such laws by the title theorists, the license theorists have offered a compromise. Under this compromise, laws that provide that the Government become the owner of all inventions developed in the course of Government research and development contracts would be replaced by laws under which the Government would merely acquire a royalty-free license for governmental purposes. Some of the proposed bills have stated that the Government should take title unless "equity" leaves title in the contractor subject to a royalty-free license to the Government. This is not a fair statutory requirement.

There is only one fair solution to the problem. That is to repeal all laws that require that the Government obtain title or at least a license under inventions developed by contractors. If

1. Long, Russell B. *A Government Patent Policy To Serve the Public Interest*, 47 A.B.A.J. 675-681 (July, 1961).

2. Daddario, Emilio Q. *A Patent Policy for a Free Enterprise Economy*, 47 A.B.A.J. 671-674 (July, 1961).

3. Lawlor, Reed C. *The Public Interest in Non-Governmental Ownership of Patents*, JOURNAL OF THE PATENT OFFICE SOCIETY, page 447-466 (July, 1961).

these laws are to be replaced at all by a new law, the new law should spell out the fair compensation theory under which the Government should always be expected to pay fair compensation for the use of any invention just as it does for any other property, regardless of whether the invention was made in the course of a Government contract or otherwise. The idea that "there ought to be a law" is unsound. It is in the public interest at times to repeal laws.

Constitutional Background

There are those who support the title theory and the license theory who object when anyone refers to the constitutional basis of the patent system. At the risk of being criticized for suggesting that the purpose of our constitutional provision should be considered, it is well to recall what the authors of the Constitution had in mind when Article I Section 8, Clause 8 of the Constitution was presented. That article provides:

> The Congress shall have the power . . . to promote the progress of science and useful arts by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries [italics added].

The purpose of granting this power to Congress was explained by James Madison in the *Federalist Papers* (No. 43). The full text of Madison's statement, which was quoted by Representative Daddario,[4] reads as follows:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly judged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.

If we read this statement carefully in connection with inventions, we find that it says in substance:

> The right to useful inventions seems . . . to belong to the inventors. The public good fully *coincides* . . . with the claims of the individuals.

Representative Daddario recognizes that this statement should not be challenged. It is submitted that even the license theory is a challenge to this statement and that therefore the license theory is not for the public good.

Congress was given the power to secure to inventors the *exclusive* rights in their discoveries. Any law that renders that right less than exclusive and any law which does not secure that right to the inventors would appear to be of doubtful constitutionality. In any event, any law which does not secure the exclusive right to inventors impairs the claims of individuals and hence, according to the words of James Madison, is contrary to the public interest.

The Government should not *as a matter of law* acquire title to inventions or even a royalty-free non-exclusive right to inventions developed by contractors. Congress should repeal such laws. Only in this way can Congress leave Government agencies with the power to negotiate contracts with contractors which are fair under the circumstances. If Congress must pass a law respecting non-exclusive licenses and title, it should pass one which says that any fixed policy of any Government agency requiring that contractors assign inventions to the Government or grant the Government a non-exclusive license is unlawful as against the public interest.

The Employer-Employee Analogy

There are many who say that the Government should acquire title to inventions from its contractors because contractors are really employees of the Government and in industry employers take all rights in inventions from their employees. Both premises are false. The conclusion does not follow.

An independent contractor is not an employee. The master-servant law has never been extended that far. To say that Government contractors are equivalent to employees fails to recognize so many principles regarding the employer-employee relationship that it is difficult to understand how the theory can be proposed at all by a lawyer.

Senator Long has said "when an inventor has devoted his own independent efforts and resources to the development of an invention, but has used his employer's resources, it is well known common law doctrine that any resulting invention is the property of the employer (citing *Standard Parts Co.* v. *Peck*, 264 U. S. 52, 59 (1926)). Similarly, when the inventor or the contractor has used Government money or facilities or both, and has been compensated by the Government for his efforts, there is no justification for giving to him also the title to the invention."[5] The common law doctrine of *Standard Parts Co.* v. *Peck* applies only where the employee was hired to make the invention in question and there was no contract which entitled the employee to retain title and no written contract that he would receive any compensation in addition to his salary if he made the invention. The analogy fails. There is nothing in the common law that forbids an employee from entering into a contract under which the employee would retain title to an invention made with the employer's facilities and funds.

Employees can negotiate special contracts with employers respecting their inventions. Why should Government contractors be forbidden *by law* to negotiate special contracts with the Government? Contractors should have the right to seek contracts under which they will be compensated fairly for the use of their inventions. Congress should not forbid Government agencies from negotiating such contracts with contractors even though the Government furnishes some of the funds and maybe even some of the tools that are used in making the invention. Laws which make it impossible for the Government to reward contractors who make inventions are not in the public interest. Such laws discourage inventors and contractors who employ inventors from entering into contracts for the solution of the research and development problems of the Government.

It is well known that many civil service employees are permitted to retain title to inventions that they make with Government facilities and on Government time subject to a royalty-free

4. Daddario, Emilio Q. *A Patent Policy for a Free Enterprise Economy*, 47 A.B.A.J. 671 (July, 1961).

5. Long, Russell B. *A Government Patent Policy To Serve the Public Interest*, 47 A.B.A.J. 675 (July, 1961).

license to the Government. Is there any reason why, as a matter of economic or political philosophy, civil service employees should be entitled to retain their inventions whereas contractors should not be entitled to retain their inventions? What kind of political philosophy is this which proposes to take inventions away from contractors that do work for the Government, but sometimes permits civil service employees to retain their inventions?

The arguments set forth for leaving title to inventions in Government employees applies equally well, if not more so, to Government contractors. Government representatives of Government agencies have often said that by leaving title in inventions with civil service employees, they are able to hire more qualified scientists, engineers, and inventors than would be the case if the Government took title to the inventions made by those civil service employees. It is suggested that when Congress enacts a law requiring that the Government own inventions made by Government contractors, it is discouraging some segments of industry, perhaps the best, from entering into contracts with the Government.

The idea that the Government is the employer of contractors and that, in all cases, employers obtain title to inventions fails to recognize the facts of economic life.

There are many individuals who refuse to work for industrial employers who require them to assign all inventions made by them to their employers. The employers get along, that is true. These men who have refused to become employees of companies that would bind them with such contracts often form their own companies and create new industries and new businesses to the benefit of the entire public and of mankind.

Congress must preserve the rights of the independent contractor just as it protects the rights of employees. Just as Congress should always protect the rights of individuals to bargain with their employers or prospective employers so that equitable contracts can be negotiated, Congress should also preserve the rights of contractors to bargain with Government agencies with respect to rights in inventions made by or for the contractors. Any law which does not protect such rights of individuals, and any law which does not protect such rights of contractors, is against the public interest. It is contrary to the claims of individuals and therefore contrary to the public good.

Who Surrendered?

Senator Long has stated:

> Many of the practices of the Department of Defense are largely the result of extreme pressure put on the Government in previous national emergencies. During World War II, the Office of Scientific Research and Development used a short-form contract with private businesses which gave to the Government title to discoveries resulting from public funds. Being a time of war, however, with our country locked in a life-and-death struggle with the totalitarian powers, the Government found itself over the proverbial barrel. Business firms, in some cases, were reluctant to perform research vital to our defense effort and to our very existence unless they got all rights to the work they did, even though the Government paid for it. The Government surrendered and started using the so-called long-form contract which gave all commercial rights to the contractors working in the war effort. This amounted to the Government's granting some firms a monopoly in certain fields and could well be described as a more extreme form of extortion. No previous patents or proprietary rights were involved at all.[6]

The Government did not surrender at all. Short-form clauses and long-form clauses were in use before the O.S.R.D. came into existence. The O.S.R.D. failed to impose the title theory on industrial contractors, because these contractors had something at stake.

It would seem to be more nearly the truth to say that during World War II Government contracting officers of defense agencies, as well as the O.S.R.D. often presented contracts to contractors containing clauses under which the inventions of contractors would be jeopardized by execution of the contracts presented by the Government contract administrators. There was many a time when a Government contractor objected to the Government's "boiler plate" and received from the Government contracting officer the answer, "You are holding up the war effort; you should sign that contract as it is." Many a contractor succumbed. Contrary to Senator Long's statement, it was not the Government that surrendered. It was some segments of industry. The disease has spread to the point where it has become epidemic. Now general prophylactic measures are needed to restore health to the community.

During World War II, the license theorists usually succeeded in obtaining royalty-free licenses, and the title theorists sometimes obtained title by an appeal to patriotism and by other pressures. The license theorists now propose that their theory be enacted into law so that it would be unlawful for a contractor to convince any Government contract administrator that his circumstances are such as to justify his receiving a research and development contract under which he would receive fair compensation based upon the extent of use of his invention made by the Government. The license theorists took a big inch during World War II.

Reed C. Lawlor received a degree in physics from the University of California at Los Angeles in 1932; he later received his LL.B. degree from Blackstone College of Law in Chicago. Subsequently he became a registered patent attorney and a member of the California Bar. Mr. Lawlor is Chairman of the Association's Special Committee on Electronic Data Retrieval.

6. Long, Russell B., ibid., page 676.

The title theorists have gone a mile in some of the laws that have recently been enacted by Congress. The license theorists now wish to return from that mile by substituting a law under which the true equities of the contractor still could often not be asserted at all.

What Is Equitable?

The words "equity of the contractor" often appear in congressional hearings and even in proposed statutes and in the policies of some Government agencies. What is this equity? It sounds good. One example of how proposed laws are inequitable should suffice.

The Brooks Bill under which the title theorists were to be routed with respect to the National Aeronautics and Space Act (during the 86th Congress) and in which the license theorists were to achieve victory required that the Government obtain from contractors under research and development contracts

> *not less than* an irrevocable non-exclusive, non-transferable, royalty-free license . . . and the reservation of such a license shall be deemed to provide for rights in inventions in a manner sufficient to protect the public interest and the equities of the contractor.[7]

Notice those words. It was proposed that Congress *by law* define equity to mean that under no circumstances could a Government contractor retain full title in any invention made in the course of a Government research and development contract with the National Aeronautics and Space Administration. If such a bill were enacted, which incidentally would be more favorable to contractors than the present National Aeronautics and Space Act, any contractor who wanted to retain full title to his inventions would not dare enter into a contract with the National Aeronautics and Space Administrator. How else could the National Aeronautics and Space Administrator give such a company financial support to expedite the solution of its problems? Though the Brooks Bill has been called a flexible bill,[8] neither it nor its successors are flexible, since they forbid compensating contractors for the use made of inventions regardless of how equitable it would be to pay such compensation.

By enacting laws that adopt either the title theory or the license theory, Congress creates a cleavage between a Government contract administrator desiring that work should be done and an industrial organization desiring to do the work but lacking sufficient funds to finance the work itself. Is such a law in the public interest? I submit that it is not. Though the proposed Brooks Bill and its successors are not as dangerous as the present Patent Section of the National Aeronautics and Space Administration and kindred laws, it, too, endangers the public interest. There are many circumstances under which it is inequitable to require that the contractor grant the Government a royalty-free license for governmental purposes. Let us consider just one.

Suppose that you are a small struggling company developing an entirely new kind of process that could be of use to the Government. Suppose, in fact, that there would be little use of your process outside of the Government. Would it be good business for you to enter into a research and development contract under which the Government would acquire a royalty-free license to use your inventions for governmental purposes?

Obviously, the answer is "yes" if you have no interest in the future of your business. The answer is also "yes" if all you are thinking of is the small profit that you will obtain from a research and development contract. Suppose that the invention can be developed for a sum of $200,000. What fraction of this is your profit? Regardless of what it is, you could make that much money, and more, some other way. If upon completion of the contract, either through lack of funds, facilities, interest or ability, you are not awarded a production contract, but a production contract in an amount of $5,000,000 is awarded to one of the industrial giants, at that point the Government exercises its right to grant such a contract to the industrial giant without paying you one nickel. Is this equitable? According to the Brooks Bill in the 87th Congress, it would be.

If Congress desires to enact a law which protects the equity of contractors, it should enact one which recognizes that contractors that make inventions should be entitled to receive fair compensation for their contributions based upon the extent of use of those contributions. The proper way to preserve the rights of contractors to receive such fair compensation is to repeal all laws under which the Government acquires either title to or a royalty-free license under the patent rights of inventions made by contractors. Only by repealing such laws can the proper balance be obtained at the negotiating table between representatives of Government and representatives of industry. Contractors who have nothing to preserve are always willing to give it away. But contractors who have something of value may refuse to do business with Government contract officers unless such laws are repealed.

Bills proposed by the title theorists and bills proposed by the license theorists create strait jackets for Government contract administrators, requiring them to adopt inflexible policies which could not be varied to meet circumstances. Government contract administrators should be permitted to follow a principle of flexibility under which the provisions of contracts respecting inventions resulting from research and development could be varied to meet circumstances and to take into account *all* the equities of the contractor, not just the equities as viewed by a title theorist or a license theorist.

Under the title theory, the Government would not pay for inventions in accordance with the extent of use. This is really, therefore, a free-title theory. Under the license theory, likewise, the Government would not pay fair compensation in accordance with the extent of use of inventions. The so-called license theory is a free-license theory. Neither the title theory nor the license theory is equitable. Only the fair compensation theory is equitable.

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7. Report of the Subcommittee on Patents and Scientific Inventions to the Committee on Science and Astronautics, U. S. House of Representatives, 86th Congress, Second Session (1960), page 33.

8. Oliver, Frank J. *Equity in Government Contract Patent Policy*, ELECTRO-TECHNOLOGY, 59 (June, 1961).

National Policy

What we need today is a new national policy which recognizes the principle of fair compensation. A statement of such policy might very well read as follows:

> It shall be the policy of the Government to avoid creating or preserving obstacles that discourage the making of inventions and the exploitation of inventions for Governmental purposes or otherwise. In furtherance of this policy, it is proposed to eliminate inflexible statutes and inflexible regulations that require contractors to grant royalty-free licenses to the Government or to assign inventions to the Government as a condition to entering into a contract. Government policies should be flexible and Government policies should be such that all who contribute to the national welfare shall be rewarded in an amount commensurate with the value of their contributions. It is recognized that the extent of such reward depends on circumstances. In all cases, Government agencies shall be encouraged to pay premiums for the contributions made by contractors who advance the state of the art. Ordinarily, the extent of use of an invention shall be deemed to be a measure of the value of the contribution.

General Comments and Conclusion

The constitutional provision giving Congress the power to enact patent laws was intended to protect the claims of individuals. These claims are gradually being destroyed, and the public interest with them. Individuals are entitled to exclusive rights in their inventions. This means that they are entitled under the Constitution to exclude others from using their inventions without their permission. Individuals want the right to work directly for the Government or to work for contractors that enter into contracts with the Government. Individuals want to preserve their rights to negotiate with employers or prospective employers. The rights of the individuals are destroyed where laws are enacted which destroy the freedom of contractors to negotiate equitable contracts with the Government which would provide fair compensation for the use of inventions developed by the contractors.

Invention is proceeding more rapidly today than ever before. Many inventions are being made under the stimulus of Government-sponsored research. Many different agencies are charged with the responsibility of contracting for research and development work. Such work frequently results in the making of inventions. The Atomic Energy Commission is charged with the responsibility of encouraging invention in the field of atomic energy. The National Space and Aeronautics Administration is charged with the responsibility of encouraging invention in the field of outer space activities. The Department of Defense is charged with the responsibility of encouraging inventions useful in the national defense. The Department of the Interior, the Department of Health, Education, and Welfare, the National Science Foundation, the Post Office Department, and many others are engaged in employing private industrial contractors to solve their problems. These agencies are faced with the need for employing the most capable organizations to solve these problems. Even if they do not wish to admit it for policy reasons, they are hampered or will be hampered by laws that make it impossible for contractors to retain title to their inventions. It is no mere fiction that some contractors, who may perchance be the most capable, refuse to accept contracts under which their rights in inventions, either past, present or future, are endangered. But few of them have been willing to testify in Congress to that effect. Many of them are afraid of "reprisal" from Government contract administrators who may be advocates of either the title theory or the license theory.

While both the title theorists and the license theorists advocate their theories in the name of the public interest, they both overlook the fact that laws enacted in pursuance of their theories introduce inflexibility into the negotiation of research and development contracts between Government contract administrators and contractors. Such inflexibility can be very detrimental to the public interest, but the detriment created by such inflexibility may never be recognized because there is no way to prove what would have occurred if the laws had been different.

The inflexible practices encouraged by the title theorists and the license theorists hurt small business more than anyone else. The way to encourage small business to do research and development is to reward small business in proportion to the use made of the inventions developed by small business. Fixed price contracts and cost plus contracts do not provide sufficient incentive to the contractors that make inventions. The incentive to create inventions by companies that are not in a position to accept substantial production contracts may be destroyed under either the title theory or the license theory.

The frequency with which laws carrying out the title theory and the license theory are being either passed or proposed is increasing. In some cases, the patent sections of bills are being proposed after the bills reach the floor of Congress. Provisions precluding the negotiation of contracts under which inventions would be paid for in accordance with the extent of use have been inserted in bills relating to helium, coal, and even oceanography.

Proposals have been made to establish a uniform policy. One uniform policy is that set forth in S. 1084 of the 87th Congress which would provide

> that the United States shall have exclusive right and title to any invention made by any person in the performance of any obligation arising from any contract or lease executed or grant made by or on behalf of the United States.

The enactment of such a law would create uniformity, indeed! It would create a uniformly bad situation, under which no firm could enter into any contract whatsoever, even a production contract, with any agency of the Government in any field whatsoever and be assured that it would even have a right to manufacture inventions made by it for its own use. This is an extreme bill. But it is not much worse than the plethora of patent clauses being included in one law after another being enacted by Congress. The title theorists and license theorists are breaking "the faggot stick by stick". It is time to stop this destruction and to repair the faggot.

No new laws should be enacted that require the Government be given title

or a royalty-free license as a condition to obtaining a Government contract. All laws of this kind which have been previously enacted should be repealed. Laws that reflect the title theory or the license theory may not dry up the well of invention, but only retard the flow. But such retardation is not in the public interest and may be detrimental to the national defense.

Congress should enact a law which encourages instead of discouraging the making of inventions for Governmental purposes. The incentive to invent for governmental purposes should not be destroyed. Congress should enact a law which makes it possible to reward contractors and inventors fairly in accordance with the contributions that they make. Congress should enact a law under which the Government is expected to pay for inventions in proportion to the value of the inventions as determined by the extent of their use by the Government. Now is no time to experiment with extension of the title theory and the license theory. Now is the time to be fair. All laws regarding Government patent rights should be equitable. And equity requires the adoption of the fair compensation principle. Such a law is needed to protect the public interest.

Opinion No. 300 of the Committee on Professional Ethics

(August 7, 1961)

Restrictive Covenant. *A covenant in a contract of employment between a lawyer or law firm and another lawyer restricting the employee from practicing law in the locality for any stated period after the termination of the employment is improper.*

Canons 6, 7, 27, 35, 37.
Opinion 266.

The opinion of our Committee has been requested by a member of the Association on whether or not it is ethical for an attorney to insert a restrictive covenant in a contract of employment with another attorney. It is stated that the restrictive covenant would be directed toward prohibiting the employee from practicing law in the city and county in which the lawyer practices for a period of two years after termination of the employment. This appears to be a question of first impression with the Committee.

Restrictive covenants of the type described are sometimes used in connection with commercial transactions such as the sale of a business, often being associated with the sale of the "good will" or "going concern value" of the enterprise.

The practice of law, however, is a profession, not a business or commercial enterprise. The relations between attorney and client are personal and individual relationships (Canon 35). The practice of law is not a business which can be bought or sold.

It was held by this Committee in Opinion 266, issued June 21, 1945, that it would be improper for a lawyer to purchase the practice and good will of a deceased lawyer who was not his partner. In this opinion the Committee said:

> The good will of the practice of a lawyer is not, however, of itself an asset, which either he or his estate can sell. As said by the Committee on Professional Ethics of the New York County Lawyer's Association in its *Opinion 109* (October 6, 1943):
>
> Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.

It appears to this Committee that a restrictive covenant of the type described would be an attempt to "barter in clients". In this connection, we call attention to that part of Canon 7, reading as follows:

> Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; ...

Canon 27 prohibits every form of solicitation of employment. A former employee of a lawyer or law firm would be bound by these canons to refrain from any effort to secure the work of clients of his former employer.

Furthermore, he would be bound, under Canons 6 and 37 to preserve the confidences, and not to divulge the secrets, of any client of his former employer, which he may have received or learned as an associate of such former employer.

Obviously, no restrictive covenant in an employment contract is needed to enforce these provisions of the Canons of Professional Ethics; and a general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status. Accordingly, the Committee is of the opinion it would be improper for the employing lawyer to require the covenant and likewise for the employed lawyer to agree to it.

The opinion of the Committee is concurred in by Messrs. Casner, Enersen, Johnson, Jones, McCown, Miller and Shepherd.

Mr. Pettengill dissents, stating his reasons as follows:

I do not consider the covenant an *unwarranted restriction* or inconsistent "with our professional status". Under certain circumstances, a law firm and its clients might be entitled to such protection. If so, a restrictive covenant would be more effective than depending on the claim that the employee-lawyer was violating a Canon of Ethics. An injunction to prevent a breach of a restrictive covenant affords a speedier and much more effective remedy.

In Memoriam:

Louis Dembitz Brandeis

by Samuel H. Hofstadter • *Justice of the Supreme Court of the State of New York*

OCTOBER FIFTH marks the twentieth anniversary of the death of Louis Dembitz Brandeis—a judge who was a prophet not without honor in his own country even in his own time. His has been "a notable and inspiring career", wrote Adolph S. Ochs on the observance of the jurist's birthday (November 13, 1931), "he has served the public well and has fulfilled the prophecy of Woodrow Wilson—'This friend of justice and of men will ornament the high court.' "

It is often true, as La Rochefoucauld suggests, that "although men flatter themselves with their great actions, they are not so often the result of great design as of chance". But America has been blessed with the advent of great men at successive stages of her development who have influenced its course.

The world has rarely seen such an aggregation as the Founding Fathers who sought to establish a democracy of opportunity out of which would emerge an aristocracy of achievement. And in our time, if the United States has succeeded in disciplining its socio-economic system—shifting from the *laissez-faire* economy of 1900 to the well-regulated industrial society we are today—without rejecting its basic philosophy nor impinging upon individual opportunity, the accomplishment is due to those who served as "goads and guides" in that process.

That distinguished company must include Brandeis, who contributed so greatly to the success of the American experiment based on the concept that government belongs to the people and not the people to the government. His great fame as a Justice of the United States Supreme Court has so far overshadowed the remembrance of his earlier accomplishments that we tend to forget his outstanding career before he ascended the supreme bench, which included that of "the people's attorney". He earned the title over the years because he refused to consider the unilateral interests of any single client without taking into consideration the rights of the general public. This was alien to the conventional mores of those practicing law at that time who were engaged in serving growing monopolies.

Doubtless, Brandeis' role as public advocate was the cause of the stormy assault on his nomination on January 28, 1916, by President Woodrow Wilson as Associate Justice of the high court. On January 29, a *Times* editorial praised his ability, integrity and fearlessness; but its front-page headline advised that his appointment would be opposed vigorously. And so it was. Some of the opposition accused him of radicalism; others complained that "he had not been tested by judicial service". The committee which had been appointed to report on the nomination held hearings during which forty-seven witnesses were heard and 1,500 pages of testimony were taken over many months. However, the nomination was confirmed on June 5; and the pressure for admission to the court chamber when Brandeis was about to take his seat was so great that the attendant waived the rules and let the people stand in the aisles.

It is fortunate for us that Brandeis was enabled to serve his country as a member of the Court (1916-1939) which has played so significant a role in the development of the nation. He had a richly stored mind with a profound sense of proportion. Unprepossessed with vested status—social or economic—he was forever concerned with the "little fellow", the disinherited and the oppressed. He spoke for the inarticulate masses. As lawyer and as judge, he strove to redress violation of human rights. Ardent for justice, with a regard for realities of the present but rooted soberly in the past, he disdained the arrant professionalism which spawns glittering abstractions that are not meaningful in application.

Many have contributed to the heterogeneous fabric of the American idea. The chief strand which Brandeis contributed was what John Dewey has called "instrumentalism": whereby the usefulness of an idea is to be determined by the consequences of acting on it, rather than by its *a priori* plausibility. Such a device employs knowledge as power. Brandeis rejected, therefore, George Eliot's engaging dictum that there is a saving grace in ignorance; he embraced the saving power of knowledge of the facts "as the generative source of the law". He was not carried away by the one-sidedness of a fanatic nor by the rashness of a radical; he judged with the cool deliberateness of a candid critic. Empiricism was blended with pragmatism —the juridical version of "nature obeys necessity".

At one stage of his career as a lawyer, when he was retained to defend before the Supreme Court the constitutionality of an Oregon statute limiting

the working hours of women, he was inspired to write a brief containing very little legal argument but setting forth pages and pages of evidence pertaining to the health, social, moral and safety welfare of the women involved and the economic advantages to the country in general. His success in that case belongs to history. Chief Justice Fuller called him the ablest man to have appeared before the Supreme Court.

The writer dissents from a view recently expressed that "of the three branches of our Government the Presidency alone has nourished individualism. The Congress and the courts must express themselves collectively". The personality of the individual judge may express itself to a degree that his thought has a lasting impact on our society. The greatest leaders are always great teachers; and the greatest judges have utilized their gifts of mind to expound and to suggest.

Thus, some twelve years after his death and fourteen years after his retirement from the Bench, a unanimous Supreme Court, subscribing to the Brandeis philosophy of jurisprudence and utilizing his method, revised its earlier holding and decided in the public school desegregation cases that "separate cannot be equal". The Brandeis legacy was there evident in three respects: that cases must be argued and decided by the application to legal principles of specific facts, rather than subjective dogma; that, so long as the basic import of those principles is not violated, they are sufficiently broad to adapt to changing social needs and conditions; that in applying those principles, adherence to precedent is not an iron rule of rigidity but a golden rule of trial and error—of growth and development, not a lead weight anchored to the initial application.

The technique which Brandeis first introduced in the Oregon case he repeated successfully before various state tribunals as well as the Supreme Court. But it received its greatest impetus from its utilization by him as a member of the Court. In opinion after opinion he piled fact upon fact amassed from legislative reports, findings of administrative agencies and studies of social scientists from this country and Europe. And if the briefs did not supply the facts, he (and his law clerk) sought them out. The crescendo reached its climax in the application of the voluminous data to familiar legal precedents.

Brandeis' insistence on getting at the facts was the technique by which he sought to infuse the experience of life into the law. Factual data were to be used to keep the fingers of the judiciary on the pulse of the nation; to make it aware of and to understand the current problems of society; to appreciate the legislative efforts to cope with the problems; to decide cases in the context of such awareness and understanding. He urged that the courts should not be rigidly bound by earlier decisions influenced by social or economic views and needs no longer prevalent. "A code of law that makes no provision for its amendment provides for its ultimate rejection", he declared. He did not disdain authority; what he objected to was weak authority which merely reproduces the ancient voice of others, without initiative or animation of its own.

Another basic thread running throughout Brandeis' philosophy was the belief that ours is essentially a system of checks and balances. A function of the judiciary was to preserve the balance among our divers entities and diverse institutions. He said that "in a democracy it is the better part of statesmanship to prevent the development of power which overawes the ordinary forces of man. Wherever such power exists it must be broken. The privilege which it begets must be destroyed."

Hence, the economic imbalance among businesses troubled Brandeis. For some years before he came to the Court he was a severe critic of the tendency toward industrial "bigness" and resultant monopoly—"so trapped in its own contradictions that it is no longer a viable method of economic organization". He believed strongly in free, fair competition so that rewards will be proportionate to success; that regulation is essential to the preservation of competition and to its best development; that regulation is more desirable than monopolistic development, later inevitably to be controlled by governmental price fixing.

Brandeis was concerned, too, over the imbalance between capital and labor. He dissented from the decisions that enjoined unions from organizing, striking, picketing or boycotting. But he did not consider that organized labor should have *carte blanche*. When unions acted irresponsibly or unlawfully he was quick to join his associates in holding them accountable for their actions. Indeed, as early as 1902 he advocated that unions be required to incorporate to make them responsible for their actions. He opposed the closed shop demands of labor as strenuously as he opposed the non-union shop demands of industry.

In labor relations, as in all other areas of American life, his central thought was of the public weal. Its influence continues to this day. In a recent labor dispute in which Secretary of Labor Goldberg participated, he succeeded in getting the parties to siphon off certain basic problems from the pending area of bargaining for future arbitrament by a long-term group to consider the public interest involved in those issues. This device was anticipated fifty years ago in the "protocols of peace" that ended the New York Cloak-Maker's strike of 1910, drawn up by Brandeis. They provided for a conciliation and arbitration board which was to confine its attention to new fundamental conflicts that might arise. In effect, the plan provided for a permanent industrial government. It served at the time as a bridge to the more orthodox kind of trade agreement. But it may very well have been the harbinger of the next development in collective bargaining beyond the collective agreement.

It is apparent that Brandeis was far from being a radical as some of his critics regarded him. For instance he recognized that long standing precedents acquiesced in and creating property rights should not lightly be disregarded; and even went so far as to say that in such cases it is more important "that a rule of law be settled, than that it be settled right", particularly where the error could be rectified by legislation. He held a "mystic reverence for the Court", Judge Learned Hand says. His respect for the inde-

Louis Dembitz Brandeis

pendence of the judiciary was made manifest in the important role he played in resisting Roosevelt's court-packing plan. He was as interested as his critics in preserving free, democratic, competitive society. But, as an exponent of realist jurisprudence with its insistence on functional realities, he would not fossilize a legal system so that it could not determine justice nor promote the social welfare. He knew that social problems can have only proximate, not ultimate, solution. He agreed with Cardozo that "law must be stable and yet it cannot stand still".

He disapproved, therefore, of raising outmoded concepts to the level of dogmas. Precedent furnishes a floor beneath which legal practice may not sink, but above which it is free to rise. In overruling prior doctrine, a court concededly legislates just as it did when it enunciated the original principle. In the words of Brandeis: "The Court bows down to experience." Precedents are followed until their irrelevance and inutility to current life are demonstrated. There can be little doubt that *Brown* v. *Board of Education* was the grand climax of many decisions in which Brandeis, while he was on the Bench, had participated that slowly eroded the language in the *Plessy* case —illustrating the "search by courts of last resort for the true rule" by modification which "implies growth [in] the life of the law". Thus, the Brandeis legacy had been put to a high use, indeed!

He shared the conviction of other judicial statesmen that "dissents are a vitalizing influence, that they promote wholesome elements to legal growth, and that each individual member must be true to his own conscience". Thus the principles he propounded in his dissents frequently became the basis for the decisions of the court limiting executive power, equalizing the balance between labor and industry in socio-economic legislation and in civil liberties. So long as even the memory of ordered freedom endures, men will recall the ringing words of Mr. Justice Brandeis' dissent in the *Olmstead* case:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Professor Mark De Wolfe Howe concludes that "Brandeis restored the relationship between morality and law which had been almost completely severed by the exuberant expansion of America." And Judge Henry J. Friendly, who served Brandeis as law clerk, calls him a twentieth century prophet; he tells us that Franklin D. Roosevelt took to addressing Justice Brandeis as Isaiah. There is no disparity in these nominations. "Jephtha in his generation was as Samuel in his generation." The prophet of every age ministers to its needs, but transcends its immediacies; he serves his time but he is not a time server. Brandeis, as a prophet of righteousness, "cried out aloud and lifted up his voice like a trumpet", even as his prototype before him, against social injustice—in the same passionate and compassionate insistence that man is, indeed, his brother's keeper—that "each man builds for all".

In Rome there is a monument to a now forgotten general bearing the simple inscription: "Because he did not despair of the Republic." Isaiah never despaired of the "People of the Book"; nor did Brandeis of "We, the People" of the Constitution. Because he shared Lincoln's vision of America as mankind's last best hope on earth and gave to it, too, the last full measure of his devotion, we shall forever be in his reverence. The life of Louis Dembitz Brandeis was thrice crowned: he was a lawyer's lawyer, the public advocate and the people's judge. The brightest jewel in his multiple crown is his good name which is a title of honor. Here, indeed, was a prophet who will always be honored by his countrymen—and fellow men, everywhere.

Lawyers and the National Purpose

In this article a lawyer-turned-businessman contrasts the roles of lawyers and businessmen in shaping public opinion. The businessman, he points out, is always suspect of speaking for special interests. The lawyer is in the position of being able to "step back a few paces" from the events of the day and speak out as his conscience directs.

by William M. Allen • ***of the Washington Bar (Seattle)***

NO MOVEMENT IN history for the improvement of man's condition and for the establishment of justice has ever succeeded without the presence, the influence and the leadership of great and courageous lawyers. To that might be added the observation that no such movements, once established, have been maintained against opposing forces without the aid of great and courageous lawyers.

It is one thing to be a lawyer and to know yourself the special traditional place of the legal profession and the judiciary in our society—to know, for example, that members of the Bar have in times past been able to speak from a point of view that was generally respected, one that usually carried with it immunity from the charge of speaking from a special interest. It is quite another thing to have been active in the law, then to go into business and to know that when you speak out on matters of public concern, there is no immunity, except that within your own mind, from the charge that you speak for a special interest. That experience soon causes you to think again and more seriously about the special privileges—and therefore the special responsibilities—of the legal profession. These—both the privileges and the responsibilities—are many in number, and in our time they have to do with our keeping and improving on what we have in this country.

One point seldom made about the practice of law—and it has to do with one of the rewards of the profession—is that the great and courageous lawyer need not be a product of the city. He can become great by being courageous in communities as different as Opportunity, Washington, is from New York City, or Salem, Oregon, from Washington, D. C. The professions of law, medicine and journalism are alike in this respect. Lincoln was the manner of lawyer of whom I speak, and the Springfield, Illinois, of his day was no greater or lesser a community than most of those elsewhere in the country. Place—in the geographic sense of the word—had little if anything to do with Lincoln's greatness. His courage, and his particular sense of responsibility, taken together with his idea of the lawyer's place in society, helped to make of Lincoln the great man that he was. We know from our history books that the conflict of opposing forces in Lincoln's time was as great as it is today—and perhaps it was greater. Yet I suspect that they were just as hard to get hold of, just as difficult to nail down in the logic of the law, as are most of the pressures exerting force upon the maintenance of what *we* have, a hundred years later.

History may provide for only one Lincoln at a time—perhaps for only one in a century, and I have no intention of suggesting that it is the duty of the legal fraternity to act in Lincoln's terms and on his scale of action. Yet a society is held together by certain institutions; the country comes to depend upon certain of the professions to help keep it bound together—and that comes about because members of those professions are especially skilled, qualified and courageous. The law is one of that number, whether represented at the Bar, on the Bench, in the legislative branches of government, or in contest with the prevailing tides of public opinion. I read recently a statement by Leon Blum, of France, that "life does not give itself to one who tries to keep all its advantages at once. I have often thought that morality may perhaps consist solely in the courage of making a choice."

The Courage To Make Hard Choices

There are lawyers in our history who have had the courage to make hard choices about what they would do concerning the special responsibilities of the lawyer. No doubt there are many in our country who are doing so today. There are judges, too—as any lawyer or judge knows when he recognizes the deeply personal commitment of those jurists who have undergone every known form of harassment in recent years as they presided over the more celebrated trials in labor law, loyalty and the issue of segregation. These are studies in courage in our own time.

Yet the courage of a Lincoln is the courage to step aside from all the advantages of the lawyer's life and to invest of one's self in the maintenance of what we have, against the pressures that are exerted toward dismembering

what we have. That requires the initiative to identify and sort out those pressures and to bring to bear an aggressive resourcefulness in learning how the lawyer can contribute—wherever he may be.

Whatever personal statement I might make about today's pressures will likely differ from yours. We should each have a personal statement, the product of our own particular experience, our own set of convictions, and the product also of whatever measure of urgency we attach to those convictions.

It is popular, perhaps too much so, to think of the designs and accomplishments of the Soviet Union as the vessel in which are contained all the things we have to fear. We are concerned about the military might of the Russians, about their advances in science, their propaganda victories and their growing economic power. These are genuine concerns and they will not go away by our simply wishing that they would.

At the same time, our own system is not going to maintain itself—and we are not going to assist toward that end if we simply hope that it will maintain itself—or that someone else will do it for us. Wishing and hoping—and worse still, the process of turning our backs—will not get us very far, except in a negative direction.

Now, I believe it is accurate to say that lawyers and the legal profession have done more than have businessmen to help our system in maintaining itself. The businessman is part of that system; the lawyer, traditionally, has had the privilege of stepping back from it, of being in it but not entirely of it. He could step back a few paces from the events of the day, from the trend of the times if he deemed it necessary, and then he could speak out as his conscience directed.

It may be timely to ask whether that tradition has been sustained in full force—and if not, why not. The Choates, the Hugheses and other men of the law who became great in the profession gained their special place by dint of their own outstanding effort as individuals. They were recognized far and wide for their dedication to the public interest—in time, thought and action—and they were sought out to help clarify the fundamental issues of their period.

Men of that stamp lived and worked in an era of the practice of law that is now of the past—but in my view, it is far from being obsolete. In 1890, there were no more than three law firms in the city of New York with more than six partners. In Chicago, the number was smaller still. Lawyers of that era pursued the law as individuals, and they did so with a considered respect for the individual's responsibility to sustain the special place of the law in the public mind.

Lawyer's Place Is Not What It Was

That is not altogether the case today, when law firms are large and most of their clients are businessmen and business firms. In many quarters, as a result, the legal profession is often viewed as an agency of business, somewhat in the pattern of the advertising agency. The expansion of business has brought about a parallel growth in the depth of the relationship between business and the law. While there are many benefits that flow from the relationship, both businessmen and lawyers have tended to give less attention than they should to the fundamental public issues of our time. I have stated that the lawyer has done a better job in this regard than has the businessman, but still the lawyer's special place is not what it once was, and today his energies are more bound up in either the business of the law or the law of business than was the case a half century ago.

Many businessmen are trying to correct their deficiencies. A considerable effort is underway *in* business to awaken managers and employees to their responsibilities as citizens. Another effort is being made *by* business to stimulate greater public participation in public and political affairs. It is not a play on words to say that the objective is to help bring about a greater public interest *in* the public interest.

Some 60,000 men and women of business have voluntarily registered in courses in public and political affairs during the past two years—courses offered and supported by business firms and Chambers of Commerce throughout the country. Businessmen are beginning to shed some of their reluctance to speak out and to take stands on public issues. That is only a beginning, and it applies to all too few responsible businessmen. It is not a simple matter to energize the whole business community toward a greater interest in government, especially when the views of so many groups in society on politics and political affairs are as cynical as they are.

Often I hear statements, as you do, to the effect that "politics" would not be an unsavory field of action if it were not for politicians. In making any such allegation, we fail to appreciate the useful functions—in fact, the very necessity—of the professional in politics, and to appreciate also the limitations which we ourselves have placed upon the entry of good men into our government.

Recently I heard it said that the single most vexing problem in a free democratic government is that too few people purchase too much influence in too many elective offices, too often. That statement could be amended to include special interest groups, as well as individuals.

The jurist who must stand for election is unhappily aware of the costs of political campaigns and of the inflation that has taken place there, as in every other segment of our lives. The lawyer who runs for political office, or who assists others in securing election, needs no reminder of the degree to which the problem of campaign financing directly influences the quality of government in this country.

Here is an example, in our own time, of a fundamental and public interest problem to which the legal fraternity could well turn its attention. Here is an instance where it is especially important that a group—or groups—of citizens be able and willing to step back a few paces from current trends and the prevailing opinions of the day, to use their special training in a manner which will inure to the benefit of their country.

In the economic realm, it will take greatness and courage to act on the knowledge that we are pricing ourselves out of world markets. This is

not a danger solely of the future; it is a fact that is here today. No longer do we have a virtual monopoly on the techniques of mass production sufficient to offset our high labor rates, nor is our productivity increasing at the same rate as it is in certain other industrial nations of the world. Where goods manufactured in the United States were once pre-eminent in quality, price and the ability to field-service those products, in many instances we no longer enjoy a dominant position. We cannot solve the problem by erecting tariff walls—unless we want short-term and short-sighted solutions.

We Must Make an Uncomfortable Reappraisal

The steps we must take will require an uncomfortable reappraisal for both labor and management of their own practices, and so far as the public is concerned, an equally uncomfortable re-examination of laws bearing upon the economy.

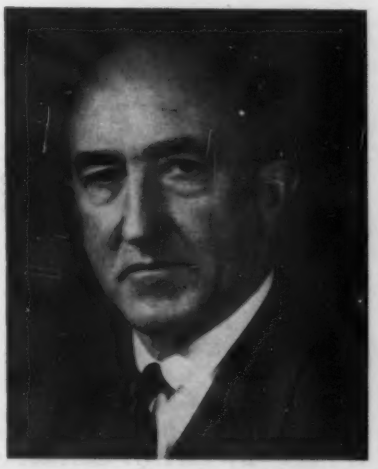
Will government do it? Or will business alone, or labor? I have my doubts, and I assume that others do. Only the public, exerting its own pressure, exerting a force greater than that now at work, and led by responsible members of all the professions, has the remote chance of seeing to it that we face up to reality and move quickly toward better solutions. There are times when one wonders whether a democratic society can maintain itself against its own pressures, and I would submit that the present is such a time. We have always prided ourselves in this country on our ability to mass our strength, whether it be moral, industrial or military, against outside forces. We have always tended to be late, but we have pulled through. There is not a comforting amount of evidence, by any scale of measurement, that we are alert now to our own self-created pressures against the maintenance of what we have in this country—and we have a need to act quickly, with courage and in the tradition of greatness.

The men whom we honor in our history had no clear-cut prescriptions for the hard realities of their times. Many of the men whom we honor today were of your profession; not all of them certainly, but a sufficient number to cause each of us to feel that the law has forged a tradition of public service which requires much of the lawyer if that tradition is to be upheld.

It has not been my purpose to suggest that the burden of action falls now upon the legal profession. Yet it has been my intention to suggest that the country has need of the lawyer's assertion of his special place in our society—that the country has need today of men and women in every community who are concerned about the fundamental issues of our time, who are willing to think hard and deeply on them, and willing also to speak out as did Lincoln on matters that require both courage and greatness.

Lincoln said that "the world has never had a good definition of liberty, and the American people, just now, are much in want of one". In our time, it might be said that we have want of a far more clear definition of national purpose, and what it will take to realize that purpose in the face of present-day reality.

Again, this is not the lawyer's task alone; yet the traditions of the law prepare each lawyer uniquely for that task.



William M. Allen has been President of Boeing Airplane Company since 1945. Until his selection for that post, he practiced law in Seattle. He is a graduate of the University of Montana (A.B. 1922) and of the Harvard Law School (LL.B. 1925).

The Challenge of Change

Professor Christol cites examples of several of our political institutions that he believes to be obsolete. He goes on to discuss the necessity of change in a democratic society if the purpose of self-government is to be achieved.

by Carl Q. Christol • *Professor of International Law and Political Science at the University of Southern California*

AT THE OUTSET let me pose the problem, namely: "Are our conditions of life inordinately subject to outmoded institutions?"

In attempting to answer this question, I hope to describe and evaluate briefly some of the social, legal and political consequences of change—or the lack of it. I begin with the ageless observation of Heraclitus, a Greek philosopher, who lived about 500 B.C., who declared that the only permanent thing in this world is change. Disraeli, some 2,300 years later, had this in mind when he proclaimed: "Unlearn what you have learned."

I have occasionally thought that if man, from the vantage point of an Olympian height, could look down upon the ageless process of history, he would observe a majestic panorama composed of man's past and present efforts to unfold the future. And I see the restless and abounding energies of countless persons, who, guided by their individual interests, are mutually engaged in the unrolling of a giant canvas in an enormous amphitheater, each laboring in his own special field of interest to enlarge the present; each pressing out against the uncertainties of the future, each engaged in a steady and persistent invasion of the future—literally a moving of the universe to achieve human good. This image provides me with satisfaction, for it is a good picture, and yet it is a bit unsettling. For I have discerned also that there are forces at work throughout the amphitheater which hesitate or oppose the unfolding of what seems to me to be such a wholesome and beneficent undertaking.

When Arnold J. Toynbee was asked why he wrote his ten-volume work, *The Study of History*, he gave two reasons: "I have hoped to get the West to look beyond its own civilization and to see history as a whole. I have hoped to encourage the Western people to look behind the material surface and to grasp the underlying spiritual meaning of themselves and the Universe."

In addressing ourselves to Toynbee's purposes, and confronted by our own current institutions, I feel that we are obliged to ask if these institutions are suited to our present needs. Are they obsolete or outmoded, and if so, which ones, and is there anything that can be done about it?

One's response depends upon a mind free of prejudice—the mind of a free man trained in the liberal arts—a man whose views are not based on the strength of authority, but on the basis of opinions fairly arrived at. The person who has been trained in the liberal arts, well supplied with a theoretical instruction and familiar with this world's competing interests and values, possesses a versatile, supple and unbiased mind. Such an individual will be qualified to address himself to the challenge of change with the abiding belief that a fair decision can be formulated and that action will follow such a decision. Such a person will approach problems with confidence. As a free man he will be unafraid, for he knows that his dignity and individuality are fulfilled by his acceptance of responsibility.

Yet, despite my confidence in the informed decisions of free men, I am aware that Americans generally have been described as amiable but dangerous. And it may be that Americans at large are particularly dangerous because, in a generic sense, they don't know or don't care to admit how obsolete and truly outmoded some of their favorite institutions really are.

If Heraclitus was right in his insight, then we stand in peril of ourselves, if we insist upon our inability to adjust to change. Thus I hold that in a free society, individuals for purposes of their own mental health, and the nation for reasons of its own national health, must be oriented in such a way that they may freely and intelligently cope with the myriad problems generated by the ever-present forces of change.

Several Illustrations

What, then, are some areas of specific present concern? I must prefix my remarks with the observation that my selected examples are drawn from the areas of my professional interests, namely law and government, and further, that corrective efforts may have been undertaken in some instances, although these efforts appear in some

instances to be too little and perhaps even too late.

As a first instance, let me take a situation with which most of us are in daily contact, namely, the effectiveness of any given municipality. Cities, in terms of meeting the wide-ranging and ever-increasing needs of a metropolitan community, are at present the dark and primitive continent of American political studies. They are, in a very practical sense, more frequently than not both too little and too late. Owing to the setting of their physical boundaries during horse and buggy days, and an unwillingness on the part of the core and its adjacent communities to assume deserved responsibilities—particularly with respect to a common and unified approach to their common problems—we are provided with many painful examples of ineptitude and inadequacy in the presence of modern needs. So long as the cities in a metropolitan area refuse to consolidate their functions and efforts so as to provide needed services at a fair price, the institution of municipal government in a metropolitan community must be regarded as completely and hopelessly outmoded.

A sorely malfunctioning, if not outmoded, institution at the level of local governmental affairs is that of public education. Between the competing interests of committees of school superintendents and co-ed cookery, local public education has too long subscribed to the cult of mediocrity. In this regard, democracy itself has been at fault through advancing the dictates of the average man, without being aware, apparently, of the highly undemocratic quality of requiring the more able or the more inspired student to run along with the rest of the pack. Fortunately, steps are under way to replace the cult of "just-getting-by" with demands for excellence, thereby restoring to public education the vision that was initially a part of its reason for existence.

A third outmoded institution, and here we move into the area of constitutional law, is the existing problem, which is common to both the state and national levels of government, of the triadic separation of powers. For many years, including the present, it has been all too common to think of government as being separated into three functions, namely, the legislative, the executive and the judicial. Realism requires one to note that there is an additional branch, namely the administrative or fourth branch of government. Fortunately, this last branch, which has been compared with Topsy, who "just growed", is fast achieving, after many years of valuable service—and despite much unfounded apprehension as to its so-called undemocratic propensities—some recognition as a permanent and viable institution. I cite this example as an admirable instance of the dedicated and often inspired work of the toilers at that great canvas of destiny which I mentioned earlier.

At the national level of government, we also have instances of institutions which have withered away on the vine with no great loss and with few tears shed. The Electoral College no longer serves its original purpose. The development of a new national institution, the political party, spelled the doom of the Electoral College soon after the Constitution went into effect in 1789.

Another institution which I believe is outmoded, and which I predict will increasingly come under attack from many quarters is the common or garden variety of labor-management crisis exemplified by the strike. Even those who claim to benefit from it concede that it is a miserable way to adjudicate differences. I believe that it is outmoded because it permits the two contending parties to cause harm and injury to innocent third parties—namely the whole public. It seems to me that intelligence requires an amelioration or elimination of this barbaric practice in the interest of the entire group. I find support for my belief in the words of Abraham Lincoln who said, with respect to the duties of government, "The legitimate object of government is to do for the people what needs to be done, but which they cannot by individual effort do at all or do so well themselves."

This instance serves as a further illustration of the point that institutions are hard to modify. Existing antinomies have their separate allegiances, and the decision as between individual and community interests is not an easy one. However, it should be noted that democracy does accord to society more of the intelligent demands of that society than any other form of government. It has proved its capacity and willingness to disregard selfish points of view in favor of larger social needs, and this may some day have its influence on the strike.

I should now like to consider another example—an illustration taken from the joint area of national and international affairs. As late as 1923, the highest court of the State of New York said: "Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war."[1]

Now, I recognize that a great deal has been said and written about the almost sacred status of sovereignty, of the supposedly inalienable rights of sovereigns, and the allegedly legitimate manifestation of sovereign rights through recourse to war or armed aggression. I think in all candor it must be recognized that sovereignty in the extreme sense, that is, the right of a state to take unilateral forceful action after consulting only its sole and exclusive interest, is a thing of the past, and certainly of the very distant past. In fact, I doubt very much that such a condition has ever existed. And when such unilateral action proposes to use force, including war, and especially total war with its policy of mass extermination, then we are obliged to challenge such an institution and urge that it is obsolete. This I feel is true, even when such a war is carried forward by brave men fighting for a just cause.

Thus, the manifestations of extreme sovereignty and extreme nationalism (and this does not refer to patriotism, which I regard as a noble sentiment), through the worship of the state, false patriotism, mental tyranny, self-idolatry and war itself in all its horrors, prove the point that nationalism in that extreme form, and the related notion of uninhibited sovereignty, are and ought to be regarded as outmoded.

Affirmatively, this world's rising demands for "togetherness" spell doom for such institutions. The capabilities

1. *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 138 N.E. 24.

of nuclear war are an impressive argument. Further, unparalleled demands for the international exchange of persons, ideas, goods and services provide substantial support for the argument.

Today, therefore, to the three alternatives of reprisals, negotiation and war, has been added another, namely, reference of international legal disputes to an international court, a responsible institution to which some attention might be given, if only as an experiment in man's struggle for survival.

So, under the aegis of a world court capable of resolving international legal disputes, we come to the role of law in modifying existing institutions. Law as a living institution operating in a living society possesses, it has been said, a statecraft all its own. As a living process with the purpose of securing good, it provides society with the equipment to secure orderly change. The importance of the existence of an orderly legal process and its availability dare not be overlooked at the international level. As an institution it can seek many purposes, and indeed it must be admitted that fixed and specific purposes do have the habit of growth and change. In fact, as some would have it, and with them I take my stand, they are changing all the time.

Finally, law is available not only to meet the needs of change. It also serves the interests of continuity and stability, the life of reason in the community. As Dean Edward H. Levi of the University of Chicago Law School has pointed out, the law is able to reject the false and popular prestige now given to public opinion. "Law itself creates sentiment, confines its course and changes it, and in heroic hours must stand against the sentiment of the moment."[2]

Why Should There Be Change?

Despite legitimate pride in social achievement, I suppose that no generation, no century and no civilization has ultimately resolved everything. According to Lewis Mumford, man's fallibility is indicated by his "limited perspectives, fallible judgment, and obvious proneness to self-deception, delusion, and error".[3]

Outmoded institutions, as the product of man's fallibility and inadequacy, ought to be eliminated for many reasons. Institutions should conform to reality, and reality today must take into account man's needs, his social advances, his spiritual orientation and his great strides in pure science and technology. Survival is not an unimportant consideration.

New and better institutions would bring cultural and material benefits to man. He would have a better opportunity to be free, to be alive, to have health, to possess such minimum creature comforts as clothing and shelter. With luck he might even get a considerable amount of peace, order and law in a truly world community. And even if the gain were to achieve only partial order and the avoidance of total chaos, he might secure some valuable time for experiments in canvas-unfolding in the hope that the future might bring with it some good tidings.

Social advance might be paralleled by individual benefits. An individual attack on outmoded institutions could easily serve as a rallying point against man's all-too-frequent feeling of aimlessness. It would be a point at which individuals might regroup after storming the enemy's outer ramparts. And this is not without some importance, lest man, without some goal, be dissolved in universal confusion with loss of allegiance and stability.

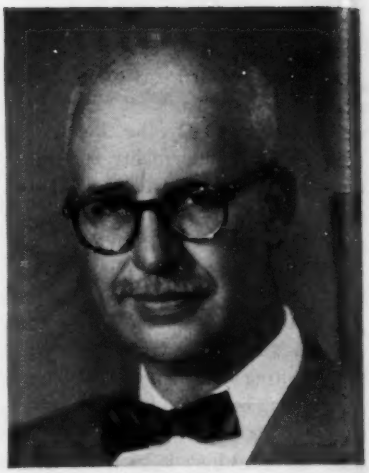
On the other hand, it might be argued that society's higher need is to avoid change and to adhere with single firmness to a settled way of doing things. I think that this is dangerous, especially if the allegiance were to become a single and all-consuming loyalty to the *status quo*. As Herbert Agar has pointed out in *A Declaration of Faith:* "The rights of conscience are secure only when men have a divided loyalty; to the government as a public utility, to the nation as a center of affection and memory, to the West as a close brotherhood of common tradition, to the human race as a brotherhood under God, to the church (to their own souls, hearts or inner lives) as a guide to what is right or wrong."[4]

Factors To Be Weighed in Effecting Change

Effecting change in a democracy is no easy thing, despite the presence of numerous techniques for this purpose. Democracy has a particular duty to provide an open forum in which freedom of discussion may take place. For without free discussion change will not be effected through democratic processes. Without such freedom, the dangers of change by totalitarian fiat only are vastly accentuated.

Democracy frequently suffers through the too-easy acceptance of plausibly stated views, by the undisciplined acceptance of emotional and demogogic views and by the passivity of those with deep convictions who do not care to rebut what they consider as "mere talk" by the more vocal members of the community. In short, there is a duty in a democracy to speak. It is an individual responsibility to analyze, evaluate and challenge existing ideas and institutions. Silence may fairly be construed as an acceptance of outmoded institutions.

According to democratic tradition,



Carl Q. Christol, Professor of International Law and Chairman of the Department of Political Science at the University of Southern California, received his Ph.D. degree from the University of Chicago in 1941 and his LL.B. from Yale in 1947. He is a colonel in the Judge Advocate General's Corps of the Army Reserve.

2. University of Michigan Law School, Centennial Address, Summer, 1959.
3. Lewis Mumford, *The Morals of Extermination*, THE ATLANTIC MONTHLY (October, 1959).
4. Herbert Agar, A DECLARATION OF FAITH (Houghton-Mifflin Co., Boston, 1952).

government itself is obliged to reconcile conflicting demands for the retention of present institutions as opposed to more modern ones. One may fairly look to government to carry this responsibility, for it is the immediate manager of social control. Only with the help of government can competing interests and values be reconciled.

In a democratic society there are constant demands for maintaining an equilibrium between individual rights and those social rights protected and advanced by the government itself. The impartiality of government in this area is an important consideration. Obviously, the government as arbiter of rights and duties must seek with great diligence to avoid advancing its own preferences, unless they have sound and rational support, over those of individuals whose contentions have merit.

It is a fundamental tenet of democracy that the individual has the right to speak, pray and live according to his conscience. Democracy affords opportunities for individual decision-making, but makes no guarantees respecting the correctness of such decisions. Democratic freedom carries with it the opportunity, as well as the right, to make mistakes as well as to achieve successes. It also provides as a matter of right an opportunity to correct earlier mistakes.

One of the present difficulties affecting the determination of policy on the basis of sound public discussion is the highly technical nature of some of the nation's most pressing and controverted problems. I refer in particular to American policy respecting its nuclear needs and capabilities. Our nuclear program, by reason of its technical complexity, functions to a large degree outside of the historic process of democratic government and is somewhat immune to public challenge, criticism or correction. In such circumstances, the most fundamental tests are imposed upon democracy. Has it equipped the political leaders of the democratic state with the information and insights to make the most desirable decision—one that would have been the public decision had the public been equipped to resolve the matter for itself? And should the leaders, even with facts and insights, be required to maintain a better batting average as respects mistakes than the public at large? Even an informed group of leaders may be expected to proceed via the standard processes of trial and error.

Education makes easier the process of change. In this respect Dean Erwin N. Griswold of the Harvard Law School has said: "What we ought to be teaching is how to go about attacking and resolving new problems, not the specific details about a vast number of problems that happen to be current now."[5]

Finally, there are standards of change. I expect that most would agree that we should save the best of past values and reconcile these with those which seem to have the best prospects for the future. Through a dynamic approach we can most effectively guarantee a vigorous individual and social existence. In combining the old with the new, we should be mindful of the observations of Woodrow Wilson who pointed out that "The worst possible enemy to society is the man who, with a strong faculty for reasoning and for action, is cut loose in his standards of judgment from the past." He would have been the first to accept the view that one need not subscribe to change merely for the sake of change and that change is not necessarily progress.

And, since change is such a fundamental part of our existence one need hardly be reminded that the struggle for the elimination of outmoded institutions is an endless one, never quite won, and ever to be pursued.

Conclusion

I believe that a number of conclusions may be drawn from my premises. Shall we ever rid ourselves of our obsolete institutions? To this I would give a qualified "Yes". If the institutions are bad enough, then the change may be not long delayed. Or, if we are dedicated enough, those not eliminated can be modified or harmonized with present needs. In this manner a suitable balance between novelty and an older synthesis can be achieved. The practical approach of adjusting one's vision to changing needs has much to commend it.

Each generation is confronted with its own standards of excellence. Today it is clear that we may not be satisfied with the product of our forebears. It is our individual and collective responsibility to excel them.

Further, it is only through the recognition of an ever-changing environment that our basic tools, namely our institutions, can be kept modern. And it is only through modern institutions that man can achieve his ultimate promise, his true potential, his final understanding and true communion with his fellow beings. Through a willingness to recognize the forces of change, he can create a better society with greater depths in freedom, justice and liberty. He can better realize true values, advance a moral order, join with other persons for the achievement of common purposes and confront with faith and hope the problem of survival in a troubled world.

I firmly believe what Chief Justice Charles Evans Hughes said in his Phi Beta Kappa address on the occasion of the 100th anniversary of the Brown University Chapter of the fraternity, that the liberal arts are the tools that the mind uses in its pursuit of understanding. Through democratically guaranteed and inspired opportunities, man can master the tools of the mind by recourse to the liberal arts. He thus becomes better disciplined, more versatile and freer from prejudice. This makes him more aware of the forces of change, and he is able to take intelligent action when confronted by change. Through a clearer insight into the quality of change, he is able to chart a course to keep abreast of it if not actually ahead of it. The value of his leadership is immeasurable.

As individuals, we confront a world endeavoring to do the best it can, but its best is not enough, particularly when it is handicapped by the dead hand of the past. We are free men in a democracy. Ours is a world of unlimited opportunities. More than we know, we are qualified to recognize society's imperfections and deficiencies and are able to do something about them.

As we confront the future, acknowledging the inevitability of change, understanding the present social complex,

5. University of Michigan Law School, Centennial Address, Summer, 1959.

open minded about the past, stern and resolute in our convictions, confident of our strengths and abilities and individual insights, and proud of our heritage as free men, we shall be obliged to determine the capabilities of our present institutions to meet the needs of the future.

We shall have to brace ourselves to our duties and responsibilities and so bear ourselves that with some mark of humble pride we can claim to have served our fellow man. Thus, we are all confronted with a broad and imaginative challenge. The opportunity is enormous. And we shall have lived a better life when we have fulfilled the demands of the present to the best of our ability.

Nor are we limited merely to observing events. In the words of Professor A. A. Berle, Jr., "We can, with a modicum of industry and imagination, discover the qualitative and quantitative impact of these events." Another observer put it thus:[6]

To LOOK is one thing.

To SEE what you look at is another.

To UNDERSTAND what you see is a third.

To LEARN from what you understand is still something else.

But to ACT on what you learn is all that really matters.

6. Quoted by Malcolm P. McNair, in THE HARVARD BUSINESS REVIEW.

Standing Committee on Professional Ethics

Summary of Informal Opinions

C-444—*Using lawyer's anteroom as polling place.* It is not improper for a lawyer, on request, to permit his anteroom to be used as a polling place, but the location should not be advertised or identified with his name or that it is a law office.

C-454—*Notice of availability for Appellate Court work.* It is proper for a lawyer to mail a notice to members of his local Bar of his availability to assist in Appellate Court work and to publish same in the local bar journal; but it is not proper for him to mail such notice to a selected number of lawyers throughout his state or to publish same in the state bar journal.

C-449—*Lawyer appearing before Board of which spouse is member.* Where a lawyer appears before an administrative board of which the spouse is a member, the spouse should decline to act. If the spouse does not do so, a majority of the Committee is of the opinion that the lawyer may ethically proceed in the matter.

C-258—*Chamber of Commerce Roster.* It is not improper for a Chamber of Commerce to publish a roster of lawyers in the community, showing addresses and telephone numbers, but the lawyers should not pay to have their names included.

C-456-7—*Community Guide and Directory.* It is improper for a lawyer to pay to have his name listed in a city or community guide and directory.

C-458—*International Directory.* It is improper for a lawyer to pay to have his name included in an international directory of business concerns and professional men.

C-465—*Bar Association advertising in community publication.* A bar association may properly carry and pay for a page in a publication advertising and promoting the community, giving a history of the Association, its aims and contribution to the community; but it may not pay for listing of its members. Individual lawyers may not pay for separate listings therein with biographical data, since the publication is not a law list within the meaning of Canon 27.

C-462—*Jury argument on damages for pain and suffering.* Whether or not it is proper for plaintiff's counsel to argue to the jury that his client should be awarded a specific sum per day for pain and suffering is primarily a question of law rather than one of ethics and would depend upon the decisions with respect to it in any particular jurisdiction.

C-466—*Lawyer guilty of income tax evasion.* Willful attempt by a lawyer to evade income tax involves moral turpitude and is unethical.

Activities of Sections

Raoul Berger

SECTION OF ADMINISTRATIVE LAW

In addition to the business transacted by its Council and the Section itself, at the annual meeting of the Section in St. Louis, August 5-8, the Section of Administrative Law had the pleasure of hearing an address at its annual dinner by General Elwood Quesada and an address at a luncheon by Dean James M. Landis. An afternoon was devoted to a discussion of "Current Developments in Administrative Procedure" by Chairman Alan S. Boyd of the Civil Aeronautics Board, Chairman Newton N. Minow of the Federal Communications Commission, Chairman Jerome K. Kuykendall of the Federal Power Commission, Chairman Everett Hutchinson of the Interstate Commerce Commission, Chairman William L. Cary of the Securities and Exchange Commission and Commissioner Philip Elman of the Federal Trade Commission. An honored guest was Judge E. Barrett Prettyman, Chairman of the President's Conference on Administrative Procedure. Dean E. Blythe Stason reported on the new Model State Administrative Procedure Act; and there was a discussion of pre-trial techniques in the administrative process headed by Chief Judge Alfred P. Murrah of the Court of Appeals of the Tenth Circuit.

The Section elected Raoul Berger, Washington, D. C., as Chairman; Frank E. Cooper, Detroit, Michigan, as Vice Chairman; and re-elected Elizabeth C. Smith, Washington, D. C., as Secretary.

SECTION OF CRIMINAL LAW

Mr. Justice Whittaker, Governors Kerner of Illinois and Anderson of Kansas headed a distinguished group of panelists at the sessions of the Section of Criminal Law during the August Annual Meeting in St. Louis. The opening program was a "Survey of Criminal Law". On the second day panels were presented on "Role of the Federal, State and Local Governments in the Administration of Criminal Justice" and "Do's and Don'ts in the Trial of Criminal Cases". A program entitled "Is the Public Getting Due Process?" was the final non-business session.

Charles L. Decker

In business sessions, the Section adopted a resolution suggesting a theme for the 1962 meeting, approved an amendment to the Section by-laws giving the Council greater freedom of action, and adopted a set of goals for the Section. The Section adopted a resolution in support of the Attorney General's Legislative Program. The Section also endorsed Council action authorizing preparation of an arrested persons pamphlet and a pamphlet on "Rights of Society and Duties of Citizens".

Re-elected to office by acclamation were Charles L. Decker, Washington, D. C., Chairman; James V. Bennett, Washington, D. C., Vice Chairman; Evelle J. Younger, Los Angeles, California, Secretary; and Fred E. Inbau, Chicago, Assistant Secretary. By unanimous vote of the Section, the Chairman was authorized to appoint a corresponding secretary, whereupon Dennis A. York was reappointed. Edward S. Silver, New York City, and Laurance M. Hyde, Jefferson City, Missouri, were elected to Council positions with terms expiring in 1965.

Joseph Gray Jackson

SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

At the St. Louis meeting the Section of Patent, Trademark and Copyright Law discussed in symposia the general revision of the copyright law, the drafting of a statute on unfair competition and the subject of information retrieval and its relation to simplification of patent claims.

Considerable attention was devoted at the meeting to the subject of patent maintenance fees or taxes.

Among the subjects receiving special study for the coming year are liberalization of formalities in patent applications, definiteness of claims, new grounds of rejection and patent interference practice.

The officers of the Section for the coming year are:

Chairman, Joseph Gray Jackson; Chairman-Elect; William E. Schuyler, Jr.; Vice Chairman; Beverly W. Pattishall; Secretary, Karl B. Lutz.

James P. Hume will continue as Section Delegate.

The newly elected members of Council are: Giles S. Rich, Herman Finkelstein and George E. Frost.

Frank L. Neuhauser has been appointed head of the Patent Division; Robert Bonynge will head the Trademark Division; and Samuel W. Tannenbaum will head the Copyright Division.

AMERICAN BAR ASSOCIATION

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Dag Hammarskjold
July 29, 1905–September 16 or 17, 1961

The late Secretary-General of United Nations was a lawyer. He received his LL.B. degree from the University of Uppsala, in Sweden, and LL.D. degrees from universities around the world.

He was probably the greatest peacemaker of our time.

> Blessed are the peacemakers; for they shall be called the children of God.

The Secretary-General died on an errand of peace in the heart of troubled Africa. He died because his plane plunged to earth. It was not due to lightning or tornado or hurricane or any Act of God.

He had powerful enemies who harassed and persecuted him. He refused to yield and, instead of accepting a comfortable retirement, pursued his vision and his mission to the end.

> Blessed are they which are persecuted for righteousness' sake; for theirs is the kingdom of heaven.

A Power Has Passed from the Earth

Plutarch tells that, as a ship was driven near to the Isles of Paxi, a loud voice was heard crying, "The great god Pan is dead." Consternation such as that set off by that shout spread through the legal world on August eighteenth when Learned Hand died. The force that had for so many years kept legal thought down to earth was ended. From thenceforth we should have to meet new problems without the active help of the great truth-seeker.

He could accept nothing that pure reason did not support. This disciple of Holmes, like the master, drew no inspiration from any "brooding omnipresence in the skies". The common law had no existence outside of the decisions of the particular sovereign's courts. By only a hair's breadth philosophy had lost the decision to law as his choice of a career on graduation from Harvard, and he kept throughout life the philosopher's profound skepticism for any conclusion founded in any degree upon an unproved assumption. The precedents and the statutes were his guide. When once he had ascertained the purpose of Congress, his view of its wisdom or folly played no part in his decision. This attitude was largely the result of an episode of which he often told. One morning, just for company, he drove up to the Capitol with Justice Holmes and, as Holmes got out of the carriage, Hand bade him farewell with that judge-to-judge parting commonplace, "Well, do justice!" Holmes' whole demeanor changed and he shouted to the coachman to stop. "Never say that to me again", he exclaimed to Hand. "I don't do justice. I simply enforce the rules."

To the superb intellect which Hand brought to bear upon the enforcement of the rules nature and grinding toil added the ability to use the English language as an instrument of expression in the manner of a Kreisler using a violin. Not so often as some other judges who were greatly endowed did he sacrifice clarity to beauty. In the light of the proverbial earthiness of his spoken language, the lucidity of his opinions was a flat refutation of the common statement that the conversational use of a tabooed vocabulary impoverishes the speaker's ability to make himself understood within the bounds of convention. The clarity of the expression of the idea embodied in his words, "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant", did not suffer from the fact that its author would undoubtedly have put it differently in conversation.

Learned Hand was deeply religious in the sense that he felt that his first duty was to attempt to solve, to the satisfaction of the mind that had been vouchsafed him, the Great Mystery. Even his devotion to the law was second to his preoccupation with the riddle of the universe. He envied anyone who had solved it to his own satisfaction and even purported to envy those who were not tormented by an irresistible drive to seek its solution. There was a realism in this religion which left no room for mercy for lawyers who had not given their all to the problem in hand or had advanced an intellectually dishonest argument. Hand was yet so tender-hearted that he used to say that

he could no longer bear to impose sentences as he had been required to on the trial bench. "It got worse as time went on", he said. "At first it gave me a sense of power that I enjoyed, God help me!"

This modest man's gift of doubting everything, even himself, served to refine away the dross and leave such treasures of the pure gold of truth as these oft-quoted words from his address to new citizens on "I am an American Day":

> The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women. The spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, nearly two-thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

Though Judge Hand, as an arbiter of men's disputes, is gone, the influence of his integrity of thought will live as long as judges honestly strive to find a way to decide cases according to law.

Convention of NATO Citizens' Commissions

Among sensational developments in international affairs that almost daily claim the public's immediate notice, our Association is doggedly determined to carry on its work toward the goal of world peace through law. The Berlin crisis, purposely manufactured by preposterously illegal Communist demands; the threats to human survival arising from their resumption of nuclear bomb tests; such conduct as the Khrushchev shoe-pounding tantrum; all these are indications that world peace is being deliberately placed in mortal peril by Communist lawlessness.

In these days it is important for us to keep before our eyes events which though less spectacular indicate what is being done and what can be done to oppose international lawlessness.

President Satterfield's report of the San Jose Conference on World Peace Through the Rule of Law (page 993) is encouraging. It points to an example of dedication to the rule of law which is essential to the preservation of those freedoms that Soviet lawlessness would stamp out.

Another important development in the same direction seems to have attracted relatively little notice. It is one which should be understood and supported especially by lawyers. This is the work of the meeting in England of the Citizens' Commissions on NATO, appointed by the governments of the United States and of the fourteen other NATO countries. Eleven of those countries were allies in World War II. The fifteen form a sort of natural alliance of those countries, mostly centered around the North Atlantic, which belong to the free world and have demonstrated their support of it against the anti-freedom countries.

The United States Citizens' Commission on NATO is composed of twenty members. The corresponding commissions of England, France, West Germany and Italy have ten members each. Canada has seven, Turkey six, Greece, Belgium and the Netherlands have four each. Denmark, Norway and Portugal each have three, and Luxemburg and Iceland each have two.

Congress provided for our Commission in 1960, but it has only recently been appointed. Its chairmanship is bipartisan, headed by Christian Herter and Will Clayton. Its membership is also bipartisan, and is representative and strong. The Commission has five subcommittees, one on legal procedure and policies, and one on the organization of an "Atlantic Convention", to deal with activities beyond the military function, which the fifteen countries might pursue in common to strengthen the free world.

The United States Commission has held a number of sessions. Its first meeting with similar Commissions from the other NATO countries was scheduled for September, in England, at the home of the Lord Chancellor, who was the first British appointee and heads the English Citizens' Commission.

The fifteen countries have relatively similar legal systems, they believe in the rule of law and they have suffered the same frustrations that all the free nations have suffered from Soviet vetoes in the United Nations. Such an alliance of free nations might perhaps even dispense with the veto power of a single member nation, which has so seriously blocked important UN action.

This Convention of Citizens' Commissions from the fifteen NATO countries may well become of great importance to the free world, and may give a new and telling impetus toward the achievement of world peace through law.

Editor to Readers

Cover Story—A Ass

"If the law supposes that," said Mr. Bumble, "the law is a ass, a idiot."

Why we quote this familiar passage from *Oliver Twist* our readers will doubtless wonder. We say "doubtless" because not one of our readers has called attention to the fact that for forty issues the words "A Ass" have been bravely emblazoned on the cover of the *Journal*. This occurred through an overlapping of printing and color in our former cover design, now changed.

We are pleased to have caught this ourselves before any critic pointed the finger of ridicule at our asses' ears.

We are glad to publish the following letter to correct an unfortunate misstatement in the August issue. We should

also like to extend our apologies to Mr. Sucharitkul.

Dear Sir,

I have noted that in this month's issue of the *American Bar Association Journal*, volume 47, 1961, page 813, my book entitled *State Immunities and Trading Activities in International Law* received a very encouraging review by Mr. Nicholas R. Doman of the New York Bar. For this I must thank both the Editor and Reviewer.

Unfortunately, Mr. Doman referred to me as "a scholarly Malayan author", and I believe I feel compelled to ask you kindly to correct this impression. I was born and until 17 bred in Bangkok, Thailand, of Thai parentage, and holding one and only Thai nationality, which I have never contemplated changing. As much as I appreciate the friendliness of my Malayan neighbours, I have never formed any intention to become a naturalized Malayan citizen.

My present position in the Ministry of Foreign Affairs of Thailand obliges me, in order to prevent further misunderstanding among my immediate colleagues and more remote compatriots, to beg you promptly to see to it that readers of the American Bar Association Journal, and in particular Mr. Doman, receive this corrected information.

Yours sincerely,

SOMPONG SUCHARITKUL

Our attention has been called to the following editorial from the June 18 issue of the Sunday Oregonian, *published in Portland, Oregon:*

Advocacy In English

"Advocacy and the King's English" is the rather forbidding title of a black-bound volume of some weight. Had it not been for the name of the compiler, Justice George Rossman of the Oregon Supreme Court, we might have put this book on the legal shelf unopened. That would have been a mistake.

Oregon's scholarly and famed jurist has brought into this volume a fascinating group of articles by distinguished lawyers and judges. Although "Advocacy and the King's English" was published by the Bobbs-Merrill Co. for Scribes, an organization of professional legal writers, for members of the bar, all that is contained therein is of equal interest and value to anyone who needs to express himself clearly and succinctly, in speech or writing.

The complexity and tedium of legal documents, as well as the meanderings of some lawyers in court, have given the public the impression that lawyers are a dull sort. The articles in "Advocacy" amply demonstrate, however, the perception, facility and humor of the great men of the law. Indeed, it was the concern of the members of Scribes that the profession improve its hum-drum style which led to Justice Rossman's assignment for the society.

"Speech is the gift of all, but clarity, cogency and beauty of expression are the acquisition only of those who strive for them," Justice Rossman wrote in his foreword.

In browsing through this volume, one is impressed that the "art of advocacy," as Sir Norman Birkett of England describes it, is not really much different from the facility in speech and writing required by a successful business man, labor leader, club woman or newspaper writer. "The right expression," Justice Rossman observes, "is the most effective weapon which the lawyer can draw from his great arsenal, the English language."

All of us use words. Those who wish to use them with most effect would benefit from perusal of "Advocacy and the King's English."

The New York Times (*September 18 issue*) *carried the following on "Lawyers and the Uses of Language"* (47 A.B.A.J. 897):

"Men of the law, a profession that is supposed to be able to handle words, are as likely as not to manhandle them, a leading lawyer suggests in the September issue of the American Bar Association Journal.

"Carl McGowan, general counsel of the Chicago & North Western Railway and a former Northwestern University law professor, said:

" 'Most of the time our lights are hidden under literary bushels of words, inexpertly put together.

" 'The law schools,' he wrote, 'as well as the engineering schools, are increasingly in despair over the inability of their students to express themselves clearly.'

"He traced the problem to deficiencies in the educational system, and to 'impurities in current speach' flowing from 'the jargon that seems to afflict government service'.

" 'The trouble with language like this,' he said, 'is that it ends up by confusing even those who devised it in the first place.' "

The San Jose Conference on World Peace Through Law

President Satterfield reports on the meeting of lawyers from all countries in the Western Hemisphere which was held in Costa Rica last June. The Conference was one of a series to be held in each region of the world preliminary to a world conference that is expected to take place next year.

by John C. Satterfield • ***President of the American Bar Association***

THE AMERICAN Conference on World Peace Through the Rule of Law, held in San Jose, Costa Rica, this June, was a giant step forward for the Association's program on World Peace Through Law. The San Jose Conference proved that our three years of preparation have been well spent, for the reports made by delegates demonstrated that in every one of the twenty-three nations represented there is more public focus upon the rule of law than at any time in all history. Throughout the hemisphere there are World Peace Through Law committees, and law days, and more editorials and articles than ever before on what law can do for humanity if utilized more widely in the world community.

By every yardstick of measurement the Conference was a landmark in the advance toward a world ruled by law. The end result, the Consensus of San Jose, is a document setting forth some principles and a program to enable achievement of our lofty objectives. It is, of course, a document containing many compromises and all do not agree to everything it recites. But when one considers that this document represents the combined views of lawyers from twenty-three nations, it is remarkable indeed for that reason alone.

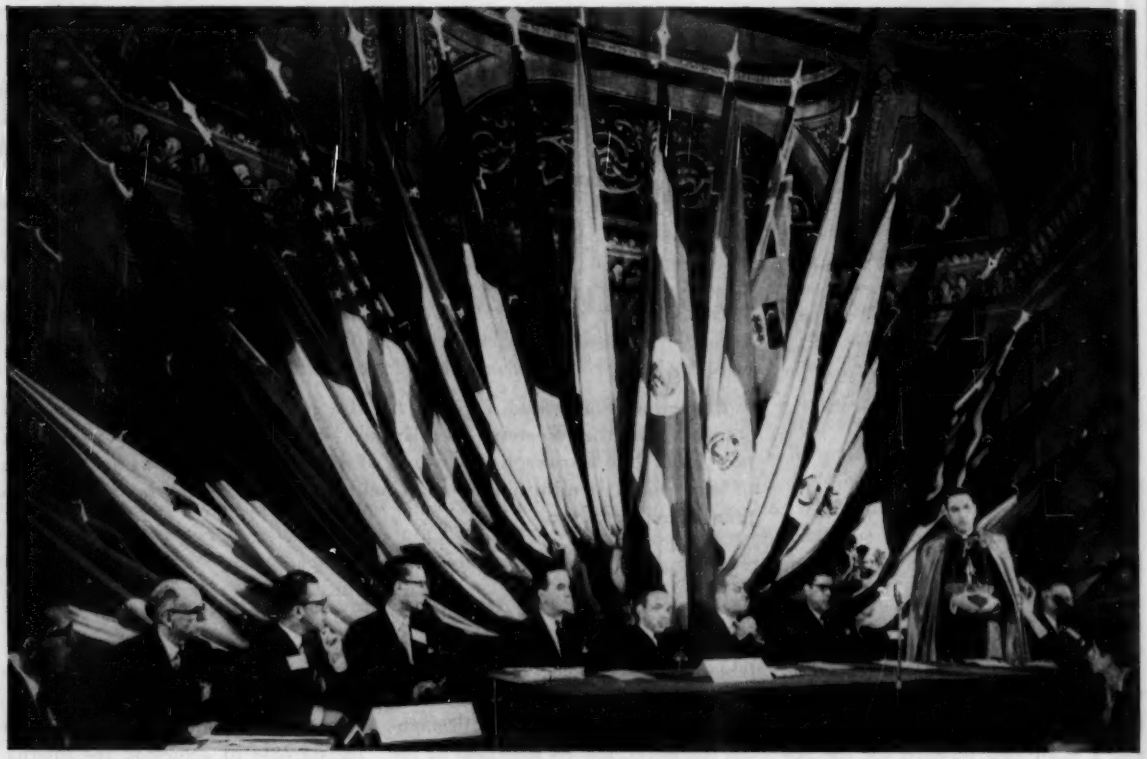
This Consensus of San Jose is notable for its welcome effort to state some of the fundamental principles of international law recognized throughout the world, and its statement of the realistic views of those attending this Conference of a concrete and practicable program to achieve our ultimate goal of world peace through law. In order to place the Consensus of San Jose and the American Conference in proper perspective, a brief review of their origins is desirable.

In October, 1957, the American Bar Association appointed a special committee on International Law Planning. This committee, headed by Governor Thomas E. Dewey, studied proposals requesting the American Bar Association to assume responsibility for initiating and stimulating a program whereby lawyers from the nations of the world would meet and discuss means whereby the judicial process on the international level could be developed to facilitate progress and to assure the maintenance of peace. A second Committee was appointed in 1959 to carry out the recommendations of the Dewey Committee. This Committee decided at its first meeting to ask lawyers throughout the world how they thought law could be strengthened in the world community and to arrange a number of regional conferences of leading lawyers, jurists and professors of law in the United States to discuss the project of organizing the legal profession of all nations of the world for the purpose of achieving the international rule of law.

The first step was an exhaustive survey made in 1958-59 among the practicing lawyers, teachers of law and the judiciary on how the rule of law and its institutions could be strengthened in world affairs so as to enable it to make a more meaningful contribution to the effort to achieve peace. More than 10,000 members of our profession at home and abroad received this inquiry.

Responses were compiled and distilled by experts in the field of international law into a working paper, which was then put before leading lawyers of our country in five regional meetings at which all states were represented. The questions posed at these meetings were such as: What is your reaction to the ideas set forth in the working paper? What other ideas do you have?

A program of education, research and organized effort by the lawyers of the United States was one recommendation of these conferences. But perhaps the major conclusion was that working alone American lawyers could accomplish very little, and that only through a concerted effort by the lawyers of all



Reading the Invocation at the Opening Session.

nations could we advance peace through law.

These conferences concluded that a world conference of lawyers should be encouraged among lawyers from all legal and political systems, preceded by four continental conferences to stimulate grass-roots thinking on a world-wide basis. These conferences were to concentrate chiefly on the improvement of existing international institutions and the creation of new ones required for the rule of law to achieve among nations the degree of order and stability which it has achieved within nations. The suggestion was made that the conferences should consider the establishment of a permanent clearing-house of ideas, programs and experience pertinent to the extension of the international rule of law, and, in this connection, to consider the possibility of a World Rule of Law Year to co-ordinate the efforts of lawyers toward the goal of extending the international rule of law.

These proposals received the support of the Ford Foundation and the International Co-operation Administration, which together granted the Committee adequate funds to permit it to carry out the suggested program. Now known as the Special Committee on World Peace Through Law, and composed of twelve lawyers representing all branches of the profession under the direction of Charles S. Rhyne, as chairman, the Committee proceeded in accordance with the proposed plan, scheduling the Conference for the Americas to initiate the series of continental meetings preceding the World Conference.

Conference Delegates a Distinguished Group

All twenty-three nations of the Western Hemisphere were represented in San Jose. The lawyers I met there constituted an unusually distinguished cross-section of the legal profession. Numerous past and present presidents of national bar associations, supreme court justices, professors and teachers and lawyers with diplomatic experience in their ministries of foreign relations or representing their countries at international organizations such as the United Nations, provided assurance that the Conference would reflect broadly based and soundly considered views. More important than the background of the delegates at the Conference, however, is the stature they possess and influence they carry in the countries they represented. Their attendance at this conference and their enthusiastic support for its program augur well for its future, both in the Western Hemisphere and in the world at large.

The handsome National Theatre of Costa Rica, scene of the meeting of Foreign Ministers of the Organization of American States some months earlier, was the site of the opening session of the Conference. Licensiado (the title given to lawyers in some Latin-American countries) Mario Echandi, President of the Republic of Costa Rica, gave a brief but effective and cogent keynote address emphasizing the inability of the world to exist much longer without instituting the rule of

law internationally. Sr. Mauricio Ottolenghi, the President of the Argentinian Bar Association, Lic. Fernando Baudrit, President of the Costa Rican Supreme Court, and I followed with formal addresses. We were heard by a distinguished audience including in addition to the delegates and observers, the diplomatic corps, leading laymen and many local lawyers, plus representatives of the international press.

One of the highlights of the opening session was the reading of messages of greetings from heads of governments of many of the states represented. The statement of President Kennedy was particularly significant, and it was certainly well received. His support for the program was expressed in the following words:

> Where people have the hope of enjoying a free and peaceful world with justice for all, they will undoubtedly find encouragement in the series of Continental Conferences starting with the San Jose Conference, in order to help create a world community in which the international disputes will be handled not on the basis of brutal force, but by the Rule of Law. . . . The Bar Associations meeting there now, and later working with their colleagues from other continents towards that great objective, constitute a model and an incentive for collective action regarding the tremendous problems of the present era.

Following the Inaugural Session the delegates commenced the hard work of the Conference in five sessions dealing with the five topics of the Working Paper which had been prepared and distributed under the auspices of the American Bar Association Committee. These sessions, held on the spacious roof of the Gran Hotel Costa Rica, proceeded exceptionally smoothly under the extremely able direction of Lic. Fernando Fournier, President of the Costa Rican Bar Association.

The five topic headings dealt with during the working sessions of the Conference were as follows: International Judicial Machinery for Peaceful Settlement of International Disputes; the United Nations and Regional Organizations as Factors Encouraging the International Rule of Law; Facilitation of International Commerce and Economic Development; Arbitration and Other Means of Settlement of International Disputes; and the Role of Lawyers in Development of the International Rule of Law.

To assist the delegates in their discussion, the working paper—which had been prepared with the assistance of lawyers and international law experts from all parts of the globe, setting down in summary form the story of the growth of international law and possibilities for constructive development of the international legal system, as well as salient problem areas—was heavily utilized. Each topic was introduced by two delegates who had prepared papers for that purpose.

In addition, many delegates submitted resolutions dealing with one or more of the topics. The Secretariat printed, translated and distributed over one hundred separate documents in both English and Spanish during the course of the meetings. All working sessions were, of course, simultaneously interpreted for both delegates and observers. During the working sessions the serious concern of the delegates and their diligent preparations were indicated by the vigor, vehemence and clarity of their expositions. Questions which received particular emphasis involved proposals for the establishment of regional courts of international law based on the contiguity and common traditions of law of their constituents, improved systems of reporting public and private arbitral decisions, strengthening the United Nations as a more effective agency to promote peace; possible action to eliminate legal obstacles to the expansion of international commerce and economic development; and measures to increase international co-operation among lawyers in moving the world toward the goal of acceptance of the rule of law in international relations.

Opportunities for the delegates to mingle and exchange ideas on an informal basis were provided at the receptions given in the delegates' honor by the Costa Rican Bar Association, the President of the Republic of Costa Rica and the Supreme Court of Costa Rica. Of special interest was the reception given by the President. The stately Casa Amarilla, the original home of the first International Court of Justice ever to be established—the Central-American Court of Justice—was the scene of this function. A formal closing dinner featuring an address on the future of law in the world community by the head of the legislative assembly of Costa Rica, Lic. Mario Leiva, concluded the Conference.

Attending these meetings as well as the working sessions were several observers. Mr. David Cottrell, Jr. (newly appointed chairman of the American Bar Association's Committee on Relations with Lawyers of Other Nations), Mr. Henry King, the acting General Counsel for the ICA, Mr. Marc Schreiber of the Legal Office of the U.N., and representatives from the Organization of American States and the Central American Development Organization were among the observers attending the meeting.

The Significance of the Consensus

I have suggested that the Conference may be judged on the basis of the Consensus of San Jose, which was discussed and approved at the final session of the Conference. I believe that it is of profound significance for several reasons. The mere fact that the distinguished lawyers mentioned above were sufficiently concerned about the problems of world peace through law to attend and contribute to this conference was a very hopeful augury. The enthusiastic response of the delegates to the meeting is indicative of the response which has been received from lawyers throughout the Western Hemisphere. This provides support for the committee's views that there are unlimited human resources which can be tapped to work for this program on a global basis.

The preamble of the Consensus, after making the statement that "the need for law in the world community is the greatest gap in the growing structure of civilization" continues that

> The broadest objectives of extending the rule of law to the international community are to develop an international legal system which will establish, first, law rules stating minimum standards of conduct for nations and individuals in international relations,

second, law rules to facilitate international social and economic contacts, transactions and development, and, finally, creative law to provide for new and adequate international institutions to achieve and maintain that order and stability which will insure rapid progress for the entire world community.

General principles of international law whose acceptance is considered essential to the establishment of an effective international legal system follow. In these the supremacy of international law in the world community is stated, the subjects of international law and the fundamental moral basis of international law are defined, and the rights and obligations of its subjects are outlined. The Consensus proclaims the imperative need for judicial settlement of international disputes, and suggests standards for judges on international judicial institutions. Abstention by nations from the unlawful use of armed force, political subversion, economic aggression and defamatory propaganda is urged as a requirement of international law. The nation's obligation to protect human rights is set forth, as is the requirement of a day in court before the imposition of international sanctions.

Three particular aspects of the Consensus appear to me to be of special significance, inasmuch as they tend to illuminate the direction in which the program is going. The first two of these ideas reflect the suggestions produced by the conferences held in the United States that a World Rule of Law Year and a permanent on-going institution for the furtherance of the world rule of law be considered. At San Jose the Consensus produced a very rough outline of the nature of a World Rule of Law Year "during which a concentrated global effort of the lawyers of the world to advance the international rule of law will be undertaken through a co-ordinated program of research, education and cooperative action utilizing all existing institutions and international and national organizations and through establishing such new institutions and organizations as may be necessary."

Considerably more detail was filled in by the Consensus concerning the suggested "World Peace Through the Rule of Law Institute" to be established on a permanent basis. Fully a page and a half of the seven-page Consensus is devoted to outlining the job which this institution would perform. A seven-point outline of the goals of a co-ordinated global research program which would be undertaken by the Institute appears to me to set forth particularly succinctly the direction for this Institute.

A. To expand existing knowledge of international law and its sources.

B. To identify areas of common agreement which may be the basis of needed international conventions, treaties or understandings.

C. To identify general principles of international law recognized by the community of nations which can form the basis and foundation for an improved international legal system.

D. To explore areas of possible agreement concerning principles and rules of international law on matters such as outer space, disarmament, peaceful uses of nuclear energy, and other areas of international concern.

E. To study and make recommendations in respect to development of international rules regulating matters of aggression, including use of armed force, subversion, economic warfare and political propaganda, and on the other hand, organized community sanctions and the right of self-defense and reprisals.

F. To study existing national and international law with a view to developing recommendations desirable for the facilitation of international commerce and economic development.

G. To create new and expand existing systems for the continuous reporting and digesting of decisions of international tribunals, international agreements, and materials and research on international law in order to create a complete, accessible world-wide source of information essential to further development of the international rule of law.

In addition to this research effort, the Institute would have the significant function of organizing and overseeing a continuous series of programs to be carried out to effectuate the foregoing. It will also undertake an intensive world-wide educational program designed to reach citizens of all nations and to impress upon them the reality of their interdependence and the vital necessity for establishing the international rule of law.

This is, I think, a realistic effort, worthy of the support of all lawyers in our association.

But the most exciting and encouraging thing about the meeting at San Jose is only suggested in the Consensus. I am referring to the delegates' pledges of active support and promises to carry on through existing legal organizations the work of the conference and the program of a sustained effort outlined in the Consensus.

In the words of the American Bar Association Committee's Annual Report, "Considered in the light of the demonstrated seriousness of intent which the delegates manifested throughout the meeting, the importance of these pledges made by the distinguished group of attorneys is difficult to overestimate. Here is convincing evidence of the support of practicing lawyers at every level which is essential to the success of the world rule of law."

At San Jose, then, the American Bar Association program of World Peace Through Law made a realistic and hard-headed beginning to a practical effort to insure that the rule of law, the only effective alternative to naked power and brute force as a basis for organization of international society, may be created. World peace through law is not a slogan of visionaries or idealists; it is the cherished objective of realists. It is the program of all those interested in a life free from fear, a life dedicated to the development of the individual rather than his destruction, and a life dedicated to securing the advantages of economic progress rather than the poverty of economic waste. This is a program in which we may all join and of which we may all feel proud.

The Legal Center Movement: Ten Years in Retrospect

Mr. Storey discusses the beginnings of the legal center movement and the rapid growth of the legal center concept in all parts of the country. He points out how important legal centers have become in the campaign to promote world peace through law.

by Robert G. Storey • ***of the Texas Bar (Dallas)***

NEARLY A DECADE has passed since the completion of the first modern legal center. The purpose of this paper is to examine the current trends in the legal center movement as a part of the Survey of the Legal Profession; to supplement observations published in the *Southwestern Law Journal* in 1950;[1] and to suggest certain practical principles concerning the organization of a legal center. The center movement has grown rapidly during recent years, and with current trends of increased interest and support it promises even greater achievements in the future.

In 1950 the main thrust of center activities appeared to be directed toward answering the cry of the Bar for increased "how to do it" training of law students and for practical continuing education for members of the Bar. At that time much was written attacking legal education on the grounds of its impracticality. One for example said:

> It should be noted that law is the only profession wherein the trainee is not accorded some practical foundation before he is "turned loose on society".[2]

Another had this to say:

> The modern law school is composed of students with casebooks, a law library, classrooms and professors, but there is nothing approximately approaching a law office or a laboratory in which the student may learn to apply the law that he may have learned.[3]

Criticism of professional competence and training was even more marked in the area of continuing legal education. This criticism was answered by increasing activities in very practical fields, primarily through institutes and publications. The practicing lawyer is exposed more and more to continuing practical education in the developing and changing fields of the law.

To determine how the legal center movement was progressing, a survey of American law schools was recently conducted as a part of the Survey of the Legal Profession. The reports of 112 law schools reflect a favorable increase in center activities. There is, in general, a continuation of the same over-all objectives motivating the center movement in 1950, *viz:* improvement of standards of legal education, more "how to do it" training, increased legal research, and specialized training of practicing lawyers with the aim of improving professional competence.

In the 1950 survey fifty of the ninety-six law schools reporting supported continuing education of members of the Bar, and thirty-nine schools had no program. At the present time sixty-six of 112 schools report a program of continuing education and only thirty-three report none. This increase seems very favorable considering the number of small schools with limited facilities and those remote from large population centers. The emphasis in continuing education remains geared to the needs of the practicing lawyer, although there is significant activity being directed toward the public responsibility of lawyers, for example, the Rule of Law movement. The typical institute may involve the law of taxation and have the discussion center around newly revised sections of the Internal Revenue Code, or the institute may involve a problem peculiar to the particular locale such as agricultural, mineral or oil and gas law. Such subjects as draftsmanship of legal instruments and estate planning typify the pamphlets and publications currently distributed among practicing lawyers.

The geographic distribution of institutes and other center activities is fairly uniform, and all sections of the country are represented. The Midwest and South appear to have the greatest amount of activity, while the Pacific Northwest is just now developing significant programs. The statistics do not reveal the significant success of institute programs. The fact is that most law schools sponsoring such programs have found them to be highly successful and popular with the practicing

1. *The Modern Law Center*, 4 S.W.L.J. 375 (1950).
2. Silver, *Law Students and the Law: Experience-Employment in Legal Education*, 35 A.B.A.J. 991 (1949).
3. Roberts, *Performance Courses in the Study of Law: A Proposal for Reform of Legal Education*, 36 A.B.A.J. 17 (1950).

Bar. Attendance is reported generally to be good and many schools have expressed plans for substantial expansion of their institute programs both in number and scope.

Graduate Legal Education

A corollary to the expansion of continuing education is the development of graduate legal education. Some thirty-three of 122 schools reporting offer graduate programs. The geographic distribution is not as even for graduate schools as for institutes, but every area of the country has at least one law school offering some type of graduate program. The greatest concentration is in the Northeast and Midwest. The size of the graduate schools varies greatly, the median size being fifteen students and the mean approximately thirty-four (these figures may be slightly distorted by a few schools with a large enrollment of evening students, many of whom are not candidates for degrees). About 15 per cent of the total 1,000 graduate students are foreign students. The most popular programs of graduate study seem to be taxation, international and comparative law.

The chief concern of the movement described in the foregoing paragraphs was the improved competence of the lawyer as a practitioner. Recent developments disclose a new appeal for improvement in another area—professional and public responsibility. New appraisals of the center movement look toward defining the role of the lawyer in society and preparing him for that role. The late Chief Justice Vanderbilt spoke of the five functions of the lawyer: the lawyer as the wise counsellor; the skilled advocate; the reformer to improve his profession, the courts, and the law; the intelligent, unselfish leader of public opinion; and the public servant. This concern with the lawyer in his relation to society has sparked new interest and development in legal education and the legal center movement. The concern over neglect of professional responsibility is reflected by the final statement of the Arden House National Conference on the Continuing Education of the Bar. It reads in part:

> Programs for continuing education thus far have placed major emphasis on professional competence and have not always given to professional responsibility the attention it should have. In the future these programs must also emphasize the professional responsibilities of the lawyer. They must help the lawyer to fulfill a wide range of professional responsibilities; to the courts, to the administration of justice, to law reform, to the law-making process, to his profession, and to the public.[4]

The Conference, held in December, 1958, was composed of distinguished members of the legal profession and financed through a grant of the Fund for Adult Education. It was the second of its kind in the history of the American Bar. The first, held in 1922, was instrumental in the development of minimum standards of legal education.

The new developments in legal centers seek to answer the challenge to professional and public responsibility. One movement emphasizing the role of the law and the lawyer in society is the development of the Rule of Law concept, with its ultimate aim of achieving world peace through law. The phrase "Rule of Law" has been defined by many philosophers, and the result is that there are almost as many definitions as there are philosophers. In a speech given before the American Bar Association in 1956, Sir Reginald Edward Manningham-Buller, the Attorney General of England, considered its meaning to most of us to be the "reverse of tyranny"; that there exist "legal barriers to governmental arbitrariness. . . ". In this speech he called attention to the danger in allowing the Rule of Law to slip away from even the firm grip of a democratic people when they become content to place greater and greater powers in the hands of administrative bodies unchecked by judicial or even legislative supervision. Increased importance of the Rule of Law today grows from its international recognition and application. Sir Reginald urged that international respect for the Rule of Law can be won only if it prevails in the various nations of the world. If this international respect can be achieved, it may provide the only solution to the threat of war. Thus, it is essential that the free nations of the world take concerted action in promoting the Rule of Law. However, such action is difficult unless the meaning is expressed so that everyone will have a common understanding of the goal. On January 5, 1959, distinguished lawyers and jurists from many countries met in New Delhi, India, as the International Congress of Jurists. At this meeting the goal of the Rule of Law within nations was defined by setting out minimum standards required by a democratic government.

Legal Centers and the Rule of Law

This discussion of the Rule of Law may seem to take us progressively further from the subject of legal centers, but the opposite is true. It brings us to closer examination of the legal center, which is peculiarly equipped to promote increased professional and public responsibility generally and the Rule of Law specifically. Now that a start has been made in laying down the fundamentals of the Rule of Law, the real problem arises: how is the goal, world peace through law, to be reached? The answer according to most writers rests squarely upon the increase of professional and public responsibility among lawyers. In recognition of its responsibility, the American Bar Association, along with other organized segments of the profession throughout the world, is giving leadership and active support to the study and implementation of the Rule of Law. For example, in his address at the occasion of the laying of the cornerstone of the American Bar Center in Chicago in 1954, the late Justice Robert H. Jackson stressed the faith that peace can be achieved by making:

> . . . The legal process of adjudication and arbitration offer an honorable and effective alternative to war as a means for correction of just international grievances.

He concluded with these words:

> What are we doing today? We are building a cathedral to testify to our faith in the Rule of Law.[5]

The expanding legal center idea is a

4. Arden House Conference. Report: Continuing Legal Education for Professional Competence and Responsibility (1959).

5. Jackson, *The American Bar Center: A Testimony to Our Faith in the Rule of Law*, 40 A.B.A.J. 19 (1954).

prime force in making the Rule of Law meaningful. Following are some examples of current center activities concerned with the Rule of Law and international problems generally.

Duke University has established a World Rule of Law Center and named Professor Arthur Larson as its director. The purpose of the center is:

> . . . to advance the objective of getting legal rules and procedures accepted and used in the settlement of international disputes, including disputes of a kind that threaten world peace. It aims to do this by maintaining a nucleus and clearing house for ideas, activities and research that will advance this aim.[6]

Georgetown University sponsors an Institute for International and Foreign Trade Law which conducts research and issues publications on the subject. It works in co-operation with a similar project at the University of Frankfurt in Germany.

George Washington University sponsors the Washington Foreign Law Society, and the construction of a modern legal center is planned. The university already supports a program of continuing legal education and research in public law.

The Natural Law Institute was organized at Notre Dame University in 1947. It has presented several annual convocations and now functions on a year-round basis publishing the *Natural Law Forum*, an annual learned journal in its fourth year of publication. The purpose of the Institute is the promotion of scholarly investigation of natural law in order to encourage the widest search for universal standards relevant to solution of contemporary problems. In addition to writings concerned with natural law, the *Forum* reports on natural law developments the world over. Thus, it becomes a clearing house in the field of natural law. Its board of editors includes professors from three European universities.

The University of Chicago has extensive research programs in comparative law, law revision, law and economics, and law and the behavioral sciences. The Comparative Law Research Center was established in 1949 to promote international legal relations. The Center serves also as a clearing-house of information for foreign research and teaching institutions and provides advice to scholars and students abroad who are engaged in international studies touching upon American law. New buildings, just completed, form a legal center which includes living quarters and a new law building, all adjacent to the American Bar Center.

Columbia University continues to expand its legal research activities, and current projects include studies in international law and a "project for effective justice". Also the school's physical facilities are being expanded. An eight-story building, Kent Hall, is now being constructed; upon completion it will house classrooms, research areas (including a 600,000 volume library) and a variety of other activities. An entire floor will provide housing for international, foreign and comparative law operations.

Public Law Centers

Another group of developments marking the trend in legal center activities, in answer to the demand for increased professional and public responsibility, is the development of public law centers. Public law centers have as their purpose research in public law and law revision. The outstanding public law centers have been established with emphasis on public responsibility. As is true of private law centers some centers have already been established, while others are in the development or planning stage. Actual public law centers that are established and operating include the American Bar Center in Chicago, the Institute of Government in Chapel Hill, North Carolina, the Georgia Institute of Law and Government in Athens, Georgia. Another public law center which has not as yet been fully developed is the George Washington University Public Law Center in Washington, D. C. Perhaps some brief descriptions would be in order.

American Bar Center. The American Bar Association dedicated its new administrative, library and research headquarters at the Annual Meeting of the Association in August, 1954. The physical plant consists of administrative headquarters for the functioning of the American Bar Association and its various departments, including the *American Bar Association Journal* and affiliated legal organizations such as the American Judicature Society and the National Conference of Commissioners on Uniform State Laws. Connected with the administrative headquarters is the library and research building. The William Nelson Cromwell Library is located in the building as well as various operational research activities. Perhaps excerpts from dedicatory speeches at the time of dedication of the Center would best describe its nature and purpose. The Chief Justice of the United States had this to say:

> We earnestly hope this Center will be the catalyst for our entire profession. Here every lawyer from city, town, or country, as an individual or through his local or state bar association could make his presence felt to remedy the defects we have inherited as well as those that continually creep into human institutions. As lawyers we know better than most other people that there are defects in our administration of justice. With adequate research we can strengthen our leadership in remedying them.[7]

This writer at that time described in part the functions of the center:

> These then, are some of our plans and some of our hopes for the American Bar Center—a single headquarters, at long last, for all administrative activities of our Association; a clearing house for all legal research in the United States; a central storehouse for all records of the organized bar; a legal arsenal for the forging of weapons and tools to improve the administration of justice; a magnetic center for those who serve the law and labor with its problems—practicing lawyers, judges, legal scholars, and public officers; in short, an intellectual and service headquarters for our profession.[8]

The Institute of Government. This outstanding Institute, operated on the campus of the University of North

6. The World Rule of Law Center, Duke University School of Law, September, 1959.
7. Warren, *The New Home of the Profession: The American Bar Center Dedication Address*, 40 A.B.A.J. 955 (1954).
8. Storey, *The American Bar Center: We Have Built for the Future*, 40 A.B.A.J. 957 (1954).

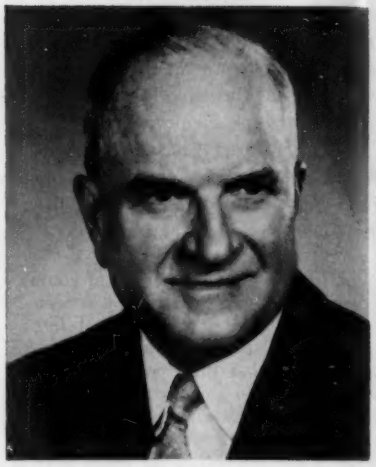
Carolina since 1942, was the dream of Professor Albert Coates. Early in his career he became concerned with the failure of textbooks on criminal law to cover adequately all the law relating to crimes and prosecution. He found that a very small percentage of the criminal cases originally filed ever reached the court of last resort. Thus in his research and investigation he went directly to the roots of criminal law, accompanying local police officers and observing the actual arrest, and followed the case through formal charge, hearing, indictment and the like. As a result of his long investigation he became convinced that there was a real need for adequate training of all law enforcement officers, beginning with the deputy sheriff or local constable and the justice of the peace, and training them in criminal law from the crime to final disposition. He organized training courses for local, administrative, county and state officers in various fields. His method of investigation, research and training was so successful that it grew into a substantial organization known as the Institute of Government. It has been my good fortune to visit the Institute, to meet with the staff and research assistants and observe the effective training and excellent results of the Institute's operation. The research specialists have studied state and local government in the library and in the field; made studies of current problems for government departments and official commissions; assisted in the drafting of legislation; published guidebooks for officials; and conducted numerous schools for officials and employees of the state and local governments. The Institute is worthy of investigation by any local, state or national group that is interested in establishing a similar institute or training center.

The Georgia Institute of Law and Government. The Institute was established in 1953 under the leadership of Dean Alton E. Hosch in connection with the College of Law of the University of Georgia. The Institute's chief purpose is research, training and service activities in the fields of law, government and public administration. The Institute enables the lawyer, the legal scholar, the public official and those who are skilled in related fields to study some of the things the law seeks to accomplish and, upon the basis of review of available materials and the application of legal thought and technique, to formulate the groundwork for legislation reasonably calculated to accomplish desired ends. University of Georgia officials investigated several law centers including the Institute of Government at North Carolina. After visiting that center immediate plans were made by the Georgia officials to begin their public law center. It is apparent that the successful operation of the Institute of Government at North Carolina had a persuasive influence upon the officials of the University of Georgia that resulted in the establishment and successful operation of the public law center.

The Organized Bar and Law Centers

Several significant new legal centers deserve mention in an article attempting to sketch the development of the center movement. One of the first principles of the center movement is the bringing together of all segments of the legal profession in a unified effort for improvement. Legal centers were instrumental in bringing the programs for continuing legal education and undergraduate legal education together under more cohesive direction. Now several legal centers have gone one step further by including the offices of the organized Bar in one unified legal center. A prime example of this development is the University of Denver Legal Center which was dedicated in September, 1961. Located in downtown Denver, the Center includes the College of Law, the offices of the Denver and Colorado Bar Associations, and complete facilities for legal education research and publication. Ohio State University and the Ohio State Bar Association have likewise co-operated in financing and building a legal center that will be the permanent home of the law school and the State Bar Association's headquarters.

The Earl Warren Legal Center at the University of California at Berkeley represents the most significant center activity on the West Coast. The Center is directed toward advanced continuing education in legal problems developed to serve the special needs of Bar, Bench, business, industry, agriculture, government and individual citizens. The Center will consist of two modern buildings joined by covered walkways. The buildings include complete facilities to handle large conferences or small meetings. The Center is currently in the organizational and development stage.



Robert G. Storey, President of the American Bar Association in 1952-1953, is a native Texan. His career has included teaching, service as Dean of the Southern Methodist University Law School and active duty in the Army during World War II. He received the American Bar Association Medal in 1956.

Law Centers Abroad

Another significant development in the legal center movement is the spread of the movement to other friendly nations during the past decade. Naturally the problems of raising the standards of legal education and improving the administration of justice are quite different in various parts of the world. But already a few foreign legal centers have come into being. Two or three are in the planning stage and others are being implemented. The foreign legal centers are given impetus from two main causes: (a) international exchange of law students, judges and practicing lawyers, and (b) the desire by the professional and governmental leaders of friendly nations

to incorporate principles of the Anglo-American governmental and legal system into their own institutions. There are several existing contracts between university law schools of the United States and law schools in other friendly nations. Some of these co-operative agreements are upon a purely private basis. Others are between the government of a particular country and our own government (generally through the International Co-operation Administration). Such contracts, public and private, in general provide for exchange of law professors, practicing lawyers and judges.

The overseas legal centers are sponsored in some instances by law schools. Others are a co-operative effort of bar associations and governments; a few illustrations are appropriate.

The Korean Legal Center was the first foreign center to be established. It came about through a co-operative effort between the American Bar Association and the Korean Bar Association. It is incorporated and occupies part of a modest building constructed by the Korean Bar Association. It has an American law library collected and presented to the Korean Legal Center under the auspices of the American Bar Association. Many members of the legal profession of Korea have been trained in recent years in United States law schools. Several of these American trained lawyers are assuming leadership in the Korean Legal Center. Even though recent events have disturbed the tranquillity of the country, it is heartening to find that the Korean Legal Center remains a "going concern". Just recently one of the great private foundations of this country operating in the Far East stated that the two prime objectives for rehabilitation of Korea under the new regime will be "law and economics". The Korean Legal Center stands as a significant force in the development of the stability of Korea.

The Pakistan Legal Center with its headquarters at Lahore is another center fully organized and operated with governmental approval. It owns an adequate tract of land donated by the government in the cultural center of Lahore. The top leaders of the judiciary, organized Bar and law schools of Pakistan are active sponsors of the Center.

The first objective of the newly created International University of Comparative Sciences at Luxembourg was to establish a Faculty of Comparative Laws. It is now in its second year of operation, and several outstanding American legal scholars are members of the Faculty and are doing much to further its objectives. The location and environment are excellent since the European Coal and Steel Community headquarters with its very effective Court of Justice are at Luxembourg. In addition, it is the center of the common market development.

The Indian Law Institute, created through a co-operative effort of the Bar Association of India and governmental legal officials, supported financially by the Ford Foundation, is well established. The Institute has permanent quarters in the beautiful new Supreme Court Building of India. It has established an excellent law library and is very conveniently located adjacent to the complete Indian Supreme Court Library.

The current effort of the American Bar Association to further world peace through law creates more demands upon the legal profession, the law schools and legal centers of the United States to render continuing and further assistance to these overseas embryonic legal centers.

The Rule of Law movement and the development of public law centers symbolize the answer of the legal center movement to the challenge of professional and public responsibility. The growth of new legal centers and the spread of the movement to foreign nations give evidence of the vitality and appeal of the center idea. In 1950 five objectives of the center movement were set forth: to promote continuing education for the Bar, improvement of the administration of justice, the expansion of legal research, free legal aid and low cost legal service, and improvement of the sponsoring law school.[9] The past few years have demonstrated that the legal center is clearly suited to meet the challenge of professional and public responsibility. Subsequent developments have perhaps even broadened the movement as an effective force to meet these goals.

Too often ignored in discussions of the legal center movement are the substantial benefits which the undergraduate law student receives from center activities. Prior to the legal center movement legal education received much criticism on the grounds of impracticality; much criticism is still voiced today. But the legal center movement embodies significant steps toward improving the competence of today's young lawyer. Moreover, many legal centers have thrown their influence behind proved ideas of long standing and improved their practical application. A typical legal center sponsors a moot court program for developing the lawyer's forensic skills. The legal aid clinic serves for the undergraduate law student as the laboratory serves the medical student. Some schools include a summer interne program with law firms, courts or other public agencies on a voluntary basis. Students have the opportunity of availing themselves of the lectures, conferences, institutes and discussions in various subjects of the law by attending the legal center's program of continuing education of the Bar. Students may benefit from contact with experienced lawyers, researchers or jurists who so often participate in the program of the legal center. But above all, the student is improved by the atmosphere and environment of a legal center which symbolizes the dignity, tradition and respect of the legal profession and the responsibility of the student to himself, the profession and the public.

Much has been written concerning the theory of the legal center. But little has been said of the practical manner in which a legal center may be organized. Since a great many people have contacted the writer concerning our experience in the financing, establishment and operation of a legal center, I shall attempt to enumerate what I believe to be some of the essential steps.

1. The prime requirement is to find the right type of dedicated leader who can initiate, inspire, plan and execute the entire legal center project. Of course any center program requires

9. Op. cit. note 1 *supra*.

the expert assistance of many people and organizations. However, there must be one leader who has the vision, judgment, energy, ability and enthusiasm to direct the movement. Preferably he should be one who has had a number of years of successful experience at the Bar and who has likewise had experience as a professor or dean of a law school. The late Chief Justice Vanderbilt, who conceived, planned and carried through to completion the New York University Legal Center, exemplifies the ideal type of leader. He was a rare combination of a most successful practitioner, an eminent part-time dean, a distinguished professor of law, a renowned jurist and an inspiring leader.

2. A successful legal center in the United States should be built around and with a successful university law school. There are, however, certain exceptions, such as the American Bar Center and certain state bar and public law centers. Not all schools are adapted to the legal center idea. Location is important. If possible a legal center should be centrally located in conjunction with a leading law school of the state. Legal centers are not peculiarly adapted only to a private as opposed to a public institution; each has advantages and disadvantages. It is absolutely essential that the dean and faculty of the law school put the full weight of their support behind the legal center. No legal center in a co-operative effort with a law school will be successful without the approval and encouragement of the president and governing board of the university. A "must" recommendation is that once the dean and law school faculty as well as the president and board of the university have approved the idea, a formal contract should be executed between the university and the foundation created to promote and organize the center.

3. While it is desirable to have financial support from a cross section of all people in the particular community where the legal center is to be located, it is absolutely essential that the leading members of the Bar support the idea. Assuming that a private non-profit foundation is organized, I should recommend participation by lawyers along the following lines:

a. Leading lawyers including the president of the state bar association, the local bar association and the chief justice of the state supreme court should be members of the board of the foundation.

b. A lawyer membership system should be created by the foundation. Various classifications may be used, such as life, sustaining, patron and regular and junior memberships. Every member of the Bar who holds an official position in the foundation should be a contributing member. In addition, I strongly recommend business and lay memberships. Interested lay members are invaluable.

In our own experience we found that corporations and partnerships will subscribe for a business membership, especially if the firm has a general counsel. Memberships usually run from $100 for junior memberships to $5,000 for life memberships. Installment payments can be arranged. In addition, nominal dues are advisable except for lifetime members. It is a good practice to provide that members in good standing may attend all ordinary institutes of continuing legal education without payment of a separate registration fee. There are exceptions when unusual institutes limited to a few are scheduled, but in such cases it is always advisable to reduce the registration fee of the foundation member.

4. Basic legal documents including the charter, by-laws and operating agreement with the university should be carefully prepared and executed with a clear statement of objectives and the jurisdiction of each institution. The next step is to organize and finance the original physical plant. Some corporations have policies against contributing for capital expenditures. In such cases, there are a number of alternatives such as making an original subscription for a particular research project or some special activity which would appeal to certain corporations and individuals. As an example, one legal center finances its program of comparative law students in the Americas through contributions from persons and corporations doing business in Latin America.

Many people, especially corporate and business officials, have a general idea that lawyers are not good givers. Experience has proved otherwise when the interest, vision, and imagination of lawyers have been challenged. Chief Justice Vanderbilt and others have demonstrated that lawyers will subscribe funds for a worthy legal center. Alumni of the law school involved are an interested group, and will work and contribute if the center is properly organized and directed. The American Bar Center is another example of widespread participation by members of the Bar in a worthy project.

5. Adequate, commodious and attractive physical facilities for the legal center are imperative. The type of building or buildings vary according to the location demands and activities. A competent architect and the officials of the co-operating foundation and law school should give very careful and thoughtful consideration to the planning of the physical plant.

6. Once the physical facilities are financed the next phase is what might be called "production". This step involves careful planning and organization of the activities of the center. Many co-operative programs between the law school and the center or foundation need to be carefully thought out and projected. Generally the law school activities, such as the undergraduate and graduate courses and programs, are the prime responsibility of the university. Non-credit programs including continuing education of the Bar, conferences, seminars and special meetings are generally under the direction of the foundation. On the other hand, a few foundations take less part in actual program direction, but serve as a vehicle through which tax deductible gifts are provided for the programs under the direction of the law school.

In retrospect the legal center movement is fixed and growing. In prospect it has an even greater future. In this the Decade of Decision—the 60's—there looms an enlarged horizon for old and new centers. New challenges face the established centers and the necessity for the creation of additional ones is clear and urgent. What are the new frontiers of law and the issues that must be resolved in this decade?

Two vital public law problems are awaiting solution. First, to strengthen the Rule of Law within and between nations. Second, to create and define the law of outer space. No single law school, legal center or bar association can do either task alone. The legal center which brings together all elements of our profession into a common workshop is the proper laboratory for the deep and thorough legal research necessary to further the Rule of Law and develop space law.

In conclusion, may I quote brief excerpts from speeches of two eminent authorities relating to the future of the legal center and the legal profession.

President Dickinson of the Association of American Law Schools in 1950 in his annual address observed: "Perhaps in another 50 years we shall become in fact if not in name an Association of American Law Centers."[10]

One of our leading scientists, Dr. Wernher von Braun, in his address to the State Bar of Texas in 1959 challenged the organized Bar to solve the law of outer space in these inspiring words: "Man's greatest adventure lies ahead. . . . The scientist and the engineer will provide the opportunity, but it remains for the legal profession to assist in establishing a proper environment for the wise exploitation of the discovery, to the end that all men of good will shall benefit."[11]

Finally, the legal center is an appropriate rendezvous for the leaders of our profession to study, plan and conduct the necessary legal research to meet the urgent challenge of our public responsibility to the end that in the words of Dr. von Braun, "[M]en will realize that there is a body of majestic law which will prevail forever. It is a law that no Congress has passed. It is the law that preserves and maintains the beauty and order of the Universe."

10. Dickinson, ANNUAL PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS.
11. Von Braun, TEXAS BAR JOURNAL, 1959, page 480.

Books for Lawyers

SACCO-VANZETTI: THE MURDER AND THE MYTH. By Robert H. Montgomery. New York: The Devin-Adair Co. 1960. $5.00. Pages 370. *(Reviewed by Alfred J. Schweppe, a member of the Board of Editors of the* American Bar Association Journal *and a former President of the Washington State Bar Association. Mr. Schweppe practices law in Seattle.)*

The *cause célèbre* of the 1920's, the *Sacco-Vanzetti* case, has recently produced a burst of new writing: "The Sacco-Vanzetti Case—The Trial of the Century", by Barry C. Reed of the Boston Bar, 46 A.B.A.J. 867 (August, 1960); "The Sacco-Vanzetti Case—A Miscarriage of Justice", by Michael A. Musmanno, Justice of the Supreme Court of Pennsylvania, of counsel for the defendants in the last stages of the case, 47 A.B.A.J. 28 (January, 1961); a reprinting in 1960, with introduction by Professor Edmund M. Morgan, of *The Untried Case: The Sacco-Vanzetti Case and the Morelli Gang* (1933), by Herbert B. Ehrmaun, one of the defense lawyers in 1926-27; and also a nationwide television show in 1960.

Earlier well-known books are: *The Case of Sacco and Vanzetti*, by Felix Frankfurter (1927), first published in the March, 1927, issue of the *Atlantic Monthly*, and reprinted in Frankfurter, *Law and Politics* (1939); Fraenkel, *The Sacco-Vanzetti Case* (1933); Joughin and Morgan, *The Legacy of Sacco and Vanzetti* (1948).

A distinctly major contribution to the understanding of this highly publicized and controversial case is made in this new book by Robert H. Montgomery, of the Boston Bar. He has made a painstaking study of all of the original records of the trial and post-trial proceedings and concludes that the trial was fair, and that the review proceedings both in the Supreme Judicial Court and at the executive level were above legitimate attack. He undertakes to explode the myth and to vindicate Massachusetts justice and the distinguished persons concerned with it in that case.

Certainly one should form no conclusions about this case without having read Mr. Montgomery's incisive and highly readable book.

In this reviewer's opinion, the evidence weighs significantly in support of Mr. Montgomery's conclusions, wholly apart from the strong and persuasive corroborative statements of the jurors after the trial as to the fairness of Judge Thayer, which was primarily under attack. Mr. Montgomery's analysis of the trial, of the motions for a new trial, of the proceedings in the Supreme Judicial Court, of the review by Governor Fuller and his eminent legal counsel, Joseph Wiggin, of the independent review by the special three-man commission appointed by Governor Fuller consisting of President Lowell of Harvard, President Stratton of the Massachusetts Institute of Technology, and Judge Grant, of Suffolk County, Massachusetts, coupled with the denial of last-minute petitions for writs of habeas corpus by Mr. Justice Holmes, and the denial of petitions for stays of execution by Mr. Justice Holmes and Mr. Justice Stone, acting separately, induce one to agree with Professor Williston that rarely, if ever, have accused men in a criminal case been so repeatedly and unanimously convicted by such competent tribunals. In November, 1927, President Lowell of Harvard wrote to former President William Howard Taft stating, "None of us had the least question about the men's guilt. The proof seemed to be conclusive. On the other hand, there was gross misstatement in the propaganda in their favor. . . ." Indeed, Mr. Justice Holmes wrote in 1930 that Sacco and Vanzetti "were turned into a text by the reds".

Space does not permit here a detailed analysis of Mr. Montgomery's book and of the case itself as elaborate and searching as the fourteen-page article by Professor William J. Hughes, Jr., in the summer 1961 issue of the *Georgetown Law Journal*, page 786, but it is directed to the reader's attention as being, along with Mr. Montgomery's fine book, in itself a significant contribution to the study of this celebrated case and to the conclusion that Massachusetts justice, so painstakingly applied, did not go awry.

OUR COMMON LAW CONSTITUTION. By J. A. C. Grant. Boston: The Boston University Press. 1960. $3.50. Pages 56. *(Reviewed by George W. Nilsson, of the Los Angeles Bar. Mr. Nilsson is a former member of the Association's Committee on American Citizenship.)*

The United States Constitution has three general sources: the English common law, political science and religion. Many of the provisions in the Constitution of the United States and in our Bill of Rights are the outgrowth of ancient wrongs. Such protective provisions were adopted to prevent the repetition of such wrongs.

The question has undoubtedly arisen in the minds of many Americans, why is a particular provision in the Constitution or the Bill of Rights? The book being reviewed discusses a number of the ancient wrongs and, therefore, gives clear reasons for certain protective provisions of the Constitution and our Bill of Rights.

The book is a reprint of three lectures given by Professor Grant at the Boston University in the Gaspar G. Bacon lecture series delivered in October, 1959. It consists of fifty-six pages of text, together with a table of English and Commonwealth cases; a table of American colonial, state and federal cases, and an index.

The scope of the lectures, in spite of the broad title, is very limited, as stated by Professor Grant: "I propose to limit my discussion to the Procedure of guaranties in the field of criminal law."

Although most lawyers have some idea of the cruelties of ancient times, it is indeed shocking to read in the first

section of this book how many of our rights were denied in England to a man charged with crime only a relatively short time ago.

At that time the defendant was denied a copy of the indictment (page 7); he was denied counsel (pages 5 and 6); he could not cross-examine witnesses against him (page 1); he was not permitted to have witnesses in his own behalf (page 3); therefore, there was no process to procure such witnesses (page 4). On page 12 appears a short colloquy showing the injustices practiced during the trial of Sir Walter Raleigh. Defendant's testimony was restricted (page 38); judges could and did fine juries (pages 24-30).

Professor Grant shows at pages 9 and 10 how such injustices were early corrected in the American colonies.

General warrants were permitted and used extensively (pages 15 and 16). This latter procedure in the American colonies was, of course, one of the causes of the American Revolution, and their use was the reason for James Otis' great speech in February, 1761, in opposition to writs of assistance.

While a number of corrective statutes are referred to by Professor Grant, it is to the credit of the common law that most abuses were corrected by court procedure (see pages 13, 16 and 30).

The second section of the book discusses relevant provisions of the United States Constitution and the Bill of Rights (Paragraph II, page 17 and Paragraph III, page 20).

The third part of the book then discusses briefly the growth of the jury system and its operation in the United States (pages 20-37) and the exclusion of certain types of evidence (pages 43-55).

On first considering the subject of these lectures, it would seem that they were probably unnecessary in view of the provisions of our Constitution and Bill of Rights, because these had effectively provided against repetition of these ancient wrongs.

However, and upon further reflection, we have only to refer to the so-called "Civil Rights Bill" of 1957, and the long and heated debate in connection therewith, to find that an effort was then made to deny the right of trial by jury.

The bill was entitled "Civil Rights Bill". This is an all-inclusive phrase. However, in the original bill, trial by jury was not included. The bill declared certain actions to be crimes. The remedy for violation of those provisions of the bill was to be by injunction issued by a federal judge. Any violation of such injunction would then be handled as a contempt of court by a judge.

It is amazing to learn that the bill as originally introduced in Congress was prepared by the Justice Department of the United States, and the then Attorney General took pride in that fact. In an address on December 29, 1960, entitled "Civil Rights" the Attorney General under whose direction the Bill of 1957 was prepared, in referring to "Civil Rights" legislation, said: ". . . I hope you will understand and excuse my pride in the significant role taken by the Department of Justice in conceiving, drafting, and fighting for their passage in the Congress."

When amendments were proposed in Congress providing that violations of the Civil Rights Law (when passed) should be covered by the provisions of the Constitution and Bill of Rights requiring trial by jury, the proponents of the original bill were vociferous in their opposition.

This naturally leads to a question: When did the right to trial by jury cease to be a civil right?

A study of the Constitution and the Bill of Rights will indicate that trial by jury is the only "civil right" which is provided for therein more than once. For instance, such provisions appear in the Constitution, Article III, Section 2, Clause 3, and in the Bill of Rights in the Fifth, Sixth and Seventh Amendments. While "trial by jury" is not mentioned in the Fourteenth Amendment, the latter requires "due process of law". (Incidentally, these protective provisions are ignored in laws creating administrative tribunals and in many proceedings before such tribunals.)

In addition, of course, there are the Ninth and Tenth Amendments, which reserve to the people of the states, respectively, the rights not specifically granted to the Federal Government.

In view of such a recent attempt to deny trial by jury to a person accused of a crime, it is well for every lawyer to read this little book and be reminded of what happens when fundamental rights are denied.

LIBEL IN NEWS OF CONGRESSIONAL INVESTIGATING COMMITTEES. By Harold L. Nelson. Minneapolis, Minnesota: University of Minneapolis Press. 1961. $4.25. Pages 135. *(Reviewed by Charles H. Paul, of the Seattle Bar. Mr. Paul is a former Judge of the Superior Court of the State of Washington and Past President of the Washington State Bar Association.)*

The author of this book is an Associate Professor of Journalism at the University of Wisconsin who was formerly a reporter for United Press. He was advised on legal questions by Professor Robert C. McClure of the University of Minnesota Law School. Probable impediments to this marriage of two minds are not entirely overcome.

The book's title is not a misnomer, but, as the author says, "this study focuses" on the House Committee on Un-American Activities and "attempts to discover and describe activities of legislative investigating committees that may not furnish a basis for the immunity of the press for liability for libel in reporting such activities."

The heart of the book is discussion of whether the Committee's public files, files reports, investigative reports, creation of sub-committees, and "quorum" procedures are "official" and "public", and thus within qualified privilege. These "proceedings", it is said, present the "nicer" questions. As might be expected, perhaps, the attempt of a journalist to employ the "nice, sharp quillets of the law" is more interesting and informative than it is convincing.

The closing chapter, "Notes to Newsmen", contains the following:

> The foregoing chapters in no way provide a score that can substitute for playing by ear in all circumstances. They raise many more questions than they answer.
> . . . the writer offers some "best guesses" in the hope that they may be of help in the day-to-day decisions that must be made so hurriedly in reporting government.
> They are considerably in the realm of

crystal ball gazing, for no one knows what the courts may decide if and when cases come to legal test.

To a newsman these frank, though perhaps too modest "notes", may be disturbing, ("playing law by ear" is not the best practice for either layman or lawyer), but to a lawyer the absence of cases on the issue during the over twenty turbulent years of the Committee's existence is likely to indicate that the problem posed is not of sufficient urgency to justify the study, if, indeed, a legal study should ever enter "the realm of crystal ball gazing".

Nevertheless, the author meticulously explores each molehill of fact and procedure which he is apparently afraid may be of significance to courts in some libel suit not yet brought, but he does not thoroughly appraise the mountain—the liberally construed constitutional powers of the Congress and its members. Reference is made to *Coffin* v. *Coffin* (4 Mass. 1), a slander suit, in which the author says Chief Justice Parsons said "he felt" the immunity should extend to the legislator ". . . for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the House, or irregular and against those rules." (What the Chief Justice actually said was "I would define the article as securing to every member exemption . . .") This quotation from *Coffin* v. *Coffin* is brushed off as "old" *dictum* referred to "for what it is worth", and strangely enough, the author, after relying on *Kilbourn* v. *Thompson,* (103 U.S., 168, 26 L. ed. 377) on another point, fails to advise the reader that the Supreme Court of the United States in that case quoted as "sound" "the views expressed" in *Coffin* v. *Coffin,* which included the quoted definition. *Dictum* or no *dictum, Coffin* and *Kilbourn* have more weight and significance today than the author allows them.

The bulk of the cases cited or discussed are suits in which "judicial proceedings" were in issue, and actions for contempt or perjury, the latter, at the most, of very doubtful or extremely limited application in libel suits. The author is of the opinion that there is an analogy "in every respect complete" between qualified privilege in judicial and in legislative proceedings. It seems self-evident, however, that there are certain kinds of activities which are "official" or "public" in a legislative proceeding which may not be so in a judicial proceeding.

"Color of authority" in the Committee proceedings considered should prevent judicial decisions which would inevitably result in almost complete destruction of qualified privilege in the reporting of legislative proceedings. It would be a hard rule, indeed, which would make the "niceties" of Committee "officiality" a trap for the unwary reporter.

Although the book seems to this reviewer to be "too much about too little", it does have certain reference values. The recitation of the development and procedures of investigating committees will be useful to students of journalism and others, such as political scientists, who have a special interest in the history of these committees, if they do not take it as the last word. Moreover, the comment on the cases, in most instances, is accurate, clear, objective, and well balanced. To what extent it aids solution of the limited problem discussed by the author is not quite so evident.

For a book on a legal subject too much space is consumed in detailing certain attacks on the committee's activities which had social and political connotations, or have no direct bearing on the legal question discussed. If quotation from Bishop Oxnam's critique on the committee report on his activities, discussion of McCarthy's investigation of Corliss Lamont and its negative result and such statements as that "prominent names" provided the committee with an "annual sensation" for the "hunt" were necessary background material, a better informational balance would have been achieved if the author had referred to some successful investigations of "prominent names" such as that of Alger Hiss, who is not mentioned, even though he became plaintiff in a libel suit based on statements concerning activities of his which had been unearthed by the Committee, or its Subcommittees.

Extensive criticism is made of "exposure" as a Committee function, the author saying "exposure" (not, at this point, the phrase "exposure, for the sake of exposure") "recently . . . has been criticized by the Supreme Court [*Watkins,* 354 U.S. 178 (1956) is footnoted] as being an improper legislative purpose" but he does not refer to *Barenblatt* (360 U.S. 109) and *Uphaus* (360 U.S. 72) decided in 1959, in which the "exposure" catch phrase was unsuccessfully invoked and was explained, if not modified. Lawyers will note that at the time this book was published the Supreme Court had not decided *Wilkinson* (365 U.S. 399) and *Braden* (365 U.S. 431).

Much of the author's difficulty with his task stems from the fact that in 135 pages it is impossible to give adequate coverage to the topics he elects to discuss. In this aspect, the book is "too little about too much". Nevertheless, Professor Nelson has made several ingenious observations which may be of value to investigating committees or their opponents, as well as providing intellectual entertainment for the lawyer who reads the book.

THE CONSEIL D'ETAT IN MODERN FRANCE. By Charles E. Freedeman. New York: Columbia University Press. 1961. $5.00. Pages 205. (*Reviewed by LaForest E. Phillips, Jr., of the San Francisco Bar. Mr. Phillips spent a year in France studying comparative law on a Fulbright scholarship.*)

Mr. Freedeman ably covers the history, the organization and the work of the *Conseil d'Etat* during the Third and the Fourth Republics, together with the necessary backward glance at its previous history and comments on its possible function in the Fifth Republic. Neither the French Government nor the French legal system can be fully understood without some understanding of the role of the *Conseil d'Etat.* Since there is no American counterpart of this organ, such an understanding can not be obtained through translation, but only through explanation.

The *Conseil* officially serves two functions which are treated at length by Mr. Freedeman. As "technical counsellor of the government" it participates

in the legislative process, in great part at the option of the government, by drafting or reviewing proposed legislation. The extent of this participation at various times during the period treated by this book is analyzed in the light of the political conflicts which determined it. The other official function of the *Conseil* is to serve as a judicial body in suits brought by private individuals against agencies of the government. In addition to these official functions, Mr. Freedeman very skillfully brings out the *Conseil's* practical functions of providing a resource of highly skilled administrative personnel who may be drawn on for other governmental functions.

Without detracting from the rest of the book, it is probably the judicial function of the *Conseil* which is of most interest to American lawyers. In England and in the United States, there has always been a distrust of a separate court system which tries only suits to which the government is a party. The cases heard by the *Conseil* are of two types, cases in which an aggrieved individual challenges the legality of a governmental rule or act (which the *Conseil* may annul) and the bulk of tort and contract claims against the government. Both of these classes involve a number of historically developed exceptions and distinctions which cannot be set forth here. It might only be mentioned that acts of the legislature are not subject to challenge, although in view of the French tradition of treating many matters that would require legislation in the United States through executive action, the sphere of review is nonetheless quite broad.

The exigencies of developing democracy and industry have faced the legal system of different countries, which have developed from widely differing antecedents, with the same problems. Many of the French cases cited by Mr. Freedeman will seem familiar to the American lawyer. Although Mr. Freedeman has chosen not to underline the parallels between the two legal systems in the body of his book, his study serves not only to introduce us to the foreign institutions which it treats, but also, by permitting the American jurist to view from a distance the role of a governmental and judicial institution in meeting problems, it enables us better and more objectively to understand the similar process that has taken place in our own government and legal system.

Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895.

By Arnold M. Paul. Ithaca, New York: Cornell University Press. 1960. $4.75. Pages 252. *(Reviewed by James W. Boyle, who practices law with a law firm in Hilo, Hawaii.)*

Much has been written about the role and power of the judiciary, but this well-written book presents a concise and valuable account of a relatively short but critical period (1887-1895) in American jurisprudence and history. Although the author, a layman, cites and discusses cases and secondary authorities, this book is designed as a history and not as a legal treatise or hornbook.

At the outset the author distinguishes two main streams of legal conservative thought during that period—laissez-faire conservatism and traditional conservatism. He defines laissez-faire conservatism as "drawing heavily on the antipaternalism doctrines of Herbert Spencer and dedicated to the utmost freedom for economic initiative and the utmost restriction upon legislative interference". Traditional conservatism is defined as one, "which, while assigning the protection of private property to a high status in the hierarchy of values, was especially concerned with the problem of maintaining an ordered society in a world where the forces of popular democracy might become unmanageable". These conservative elements of the legal profession verbalized the crisis psychology of that period due to the growing popular discontents and the innovation of reform legislation.

The events in this period—*e.g.*, labor strife, Coxey's armies, the rise of Populism, the depression and financial panic of 1893, the control of federal and state governments by popular majorities, the Bryan campaign with its free silver, anti-Wall Street, and anti-court planks—sparked what the author describes as a conservative-oriented revolution in American constitutionalism in which even legal progressives and moderates were eventually forced to join as the lesser of two evils. This "new judicialism", as the author terms it, vastly expanded the scope of judicial supremacy and witnessed the judiciary emerge as the principal bulwark of conservative defense, with important consequences for American economic and political history.

As convincing proof of the judiciary's obstructionist role the author dedicates countless pages to the use of the due process clause (*e.g.*, the "freedom of contract" doctrine) as a substantive check on reform legislation, the development of the labor injunction as an anti-strike weapon, the near-emasculation of the Sherman Antitrust Act, and the overthrow of the federal income tax.

In this book the author has traced, chronologically and very effectively, the interplay of social unrest, court decisions, and the changing attitudes of the legal profession during this period. To illustrate these changing attitudes he drew heavily on speeches before state and national bar associations and on articles in legal periodicals of that time. This book, a co-winner of the 1959 Alfred J. Beveridge Award, is both educational and pleasurable.

Political Theory: The Findings of Twentieth-Century Political Thought.

By Arnold Brecht. Princeton, New Jersey; Princeton University Press. 1959. $12.00. Pages 603. *(Reviewed by Lester E. Denonn. Mr. Denonn is a 1928 graduate of New York University Law School and practices law in New York City.)*

The author is Professor Emeritus of the Graduate Faculty of Political and Social Sciences of The New School of Social Research where he served with distinction as a member of the "University in Exile". Alvin Johnson, founder of the University, in his charming autobiography, *Pioneer's Progress*, writes of this "political jurist and parliamentarian" among the "expelled professors" and makes this revealing comment about him: "Arnold Brecht was delayed for several months (1933) conducting the legal defense of the

Social-Democratic leader, Carl Severing, at great risk to his own liberty."

It is noteworthy, therefore, that this volume, which gives every evidence of the distillation of a lifetime of thought devoted to the field of political science, should present its author's views, as his logical insight dictates, regardless of what opposition such views may create or from whence such opposition may arise.

The volume is different from the usual work on the subject of political theory. It is more properly a methodology of scientific theory than a review of the thoughts of prior political thinkers. Nonetheless the views of earlier and contemporary political philosophers as well as those of the author are quite apparent throughout. Professor Brecht claims with some justification that this is a pioneering work in the field of scientific political theory. "The present volume deals primarily with *general* theory; including the philosophic and scientific foundations of scientific political theory; its methods; its uses; its strength and its limitations; and what may be called its *wisdom*."

The work is divided into four parts. In the first section there is an extended expansion of the author's theory of Scientific Value Relativism, the development of which is the major purpose of the volume. The second section reviews the genesis of such a scientific approach to political theory and the third division consists of a polemic against critics of the type of methodology advocated by the author. The concluding section illustrates the use of the theory in what the author characterizes as the border line of metaphysics.

At the outset Professor Brecht outlines the various steps required in scientific method and then discusses these steps at some length. He then abstracts from this discussion the basis for his theory of a Scientific Value Relativism, a term which he confesses is very clumsy but which emphasizes the various factors involved in what he feels is an important approach to political theory. The term "Value Alternativism" he feels might be equally expressive. His aim is to emphasize the fact that a proper scientific method will recognize at all times the variety and relativity of the values that are considered and their hypothetical nature with the result that the logical political theorist will make no leap from the IS to the OUGHT. He then applies this approach to the general subject of justice in the course of which discussion he gives an excellent summary of the eclipses and revivals of the natural law doctrine. This is advanced to illustrate the ease with which theorists can lose sight of the fact that theories dealing with relative hypothetical values are not hard and fast absolutes. "The service to justice that he can render is chiefly to be sought for (1) in the clarification of the meaning of alternative ideas of justice, (2) in the scientific examination of the consequences and risks involved in their acceptance and practical execution, and (3) in the fight against all dogmatic doctrines regarding justice that are offered with the pretense that their general validity is scientifically established, a claim that is necessarily untenable under Scientific Method."

In the development of his thoughts Brecht refers to scores of prior thinkers and the contributions they have made to Scientific Method and to political theory. As an example of the forerunners he quotes the famous letter from Justice Holmes to William James written in 1907: "But I have learned to surmise that my can't helps are not necessarily cosmic can't helps—that the universe may not be subject to my limitations; and philosophy generally seems to me to sin through arrogance."

Brecht gives a very interesting survey of the possible values discussed by representative writers of the Twentieth Century as the basis for his analysis of their views in the light of the method he advocates.

In the concluding section the author shows that while there may not be scientific proof in connection with some theories that are advanced, nevertheless, so long as this fact is borne in mind, such theories can be examined in order to consider their effects upon man's political activities.

The author is now engaged in the preparation of a companion volume which will be devoted to special topics analyzed in the light of the method here advocated. This work will be a welcome addition to the author's contributions to the field of political theory.

United States Government Organization Manual

The 821-page official organization handbook of the Federal Government, *United States Government Organization Manual*, contains detailed information on the legislative, judicial and executive branches. It outlines the legislative authority, purposes and functions of each agency; includes forty-one charts showing the organization of the Congress, the executive departments and the larger independent agencies; and lists the names of more than 4200 key officials.

A 58-page section provides brief histories of federal agencies whose functions have been abolished or transferred since March 4, 1933; another 30-page section lists several hundred representative publications available from government establishments.

The *Manual* is a perennial "best seller" among Government publications. Compiled by the Office of the Federal Register of General Services Administration's National Archives and Records Service, the manual may be purchased for $1.50 a copy from the Superintendent of Documents, Government Printing Office, Washington 25, D. C.

ANNOUNCEMENT

of the

1962 Ross Essay Contest

Conducted by the

American Bar Association

Pursuant to the terms of the bequest of Judge Erskine M. Ross, deceased.

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"HOW MAY THE DISPOSITION OF
PERSONAL INJURY LITIGATION BE IMPROVED?"

Eligibility:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1962 (except previous winners, members of the Board of Governors, officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured upon request to the

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What's New in the Law

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Attorneys at Law . . . *malpractice*

The failure of two lawyers to instruct their clients that a chattel mortgage required acknowledgment and recordation to make the mortgagees secured creditors has been ruled a valid basis for a malpractice suit by the California District Court of Appeal for the First District.

The defendants had drafted the note and mortgage as attorneys for the mortgagees and one of the two mortgagors. The papers were picked up at their office by one of the mortgagors without any instructions about acknowledgment of signature or recording. In a subsequent bankruptcy of the mortgagors, the plaintiffs-mortgagees were relegated to the class of unsecured creditors. The trial judge found the attorneys negligent, but gave them judgment nevertheless on the ground that the mortgagees' failure to inquire about the proper execution of the papers amounted to contributory negligence barring a recovery.

The Court, although holding that contributory negligence is an appropriate defense in an attorney-client malpractice suit, reversed the trial judge's conclusion. It declared that the clients could not be charged with contributory negligence for failing to do something for which they employed the attorneys either to advise them about or to do. "Clearly", the Court said, "the value of an attorney's services in connection with a transaction of this nature consists largely of his superior knowledge of the necessary legal formalities. . . . If laymen such as appellants were already familiar with the requirements to be met in order to attain the legal status of secured creditors, it would seem likely that there would be a considerable decrease in the demand for attorneys' services. Appellants employed respondents to perform a specific legal service for them. Respondents negligently failed to do so."

(*Theobald* v. *Byers*, California District Court of Appeal, First District, June 10, 1961, Shoemaker, J., 13 Cal. Rptr. 864.)

In New York an attorney sued for malpractice has fared somewhat better. The basis of the suit there was negligence in having a testatrix's son, to whom specific real property was devised by the will, act as one of the attesting witnesses. The result, of course, was that the devise was void. But, the attorney pointed out, this occurred in January of 1953, and the action was not commenced until January of 1961, the testatrix having died in December, 1959. He argued that the suit was barred by the statute of limitations.

The Kings County Supreme Court, Special Term, agreed with this contention and dismissed the suit. It held that the gist of the action was the lawyer's breach of his professional contract to use the diligence and skill required and expected of him as an attorney-at-law in the execution of the will, and that this breach occurred when the will was executed. Therefore, it concluded, the action for malpractice accrued on the occurrence of that negligence and not on discovery of the malpractice after the mother's death.

The Court rejected the son's counts and arguments that the retention of the will by the lawyer from the time of execution until the testatrix's death constituted a type of "continuing negligence" or deceit. As to the deceit count, the Court remarked that the plaintiff had failed to show that the defendant's retention of the will embodied the classic elements necessary for an action in deceit. "Plaintiff was aware", it said, "of the fact that he had witnessed his mother's will. It was that act which voided the will's provision. It cannot be urged therefore that defendant's possession prevented plaintiff, by deceit or otherwise, from learning the fact that he had witnessed his mother's will."

(*Goldberg* v. *Bosworth*, New York Supreme Court, Kings County, Special Term, May 26, 1961, Feiden, J., 215 N.Y.S. 2d 849.)

Constitutional Law . . . *telephone solicitation*

The first reported constitutional test of a telephone anti-solicitation ordinance has resulted in the Supreme Court of Alabama upholding the ordinance against a request for a temporary injunction.

The Anniston ordinance declares it a nuisance and unlawful for any "solicitor, peddler, hawker, itinerant merchant, or transient vendor, not having been requested or invited so to do by the person called over the telephone", to call "for the purpose of soliciting such person called to make a donation, or to subscribe to or for advertising, or to give or to pay money or other thing of value for any ticket, flag, tag, badge, flower, token, or symbol. . . ." The ordinance was challenged by an organization which solicited advertising in its magazine by telephone. Only an affidavit of the secretary was submitted to support the application for a temporary injunction. The trial court denied the application.

The Supreme Court affirmed the denial of the temporary injunction, but did not entirely foreclose a final decision against the ordinance. It preferred not to decide the final constitutionality until a decision below on the merits, but it drew an analogy to the decision of the Supreme Court of the United States in *Breard* v. *Alexandria*, 341 U. S. 622, in which a door-to-door anti-solicitation ordinance was upheld. By the same token, the Court said, if unwanted knocks on the door may be declared a nuisance, so

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

may an unwanted telephone call.

"When the telephone rings", the Court remarked, "the person called answers the telephone because there is no way for him or her to determine in advance whether it is an unwanted or wanted telephone call. There certainly are times when even a person of temperate disposition, when he finds out that the one calling is seeking to get him to purchase an advertisement or to make a donation or pay money for some ticket, flag, tag, badge, flower, token, or symbol, is outraged or upset by such call."

The Court, however, raised a question as to whether this might apply to business telephone calls and concluded that the validity of the ordinance should not be determined on an *ex parte* affidavit in an application for a temporary injunction.

(Alabama Law Enforcement Officers, Inc. v. *Anniston,* Supreme Court of Alabama, June 22, 1961, Stakely, J., 131 So. 2d 897.)

Contracts . . . *interference*

The Supreme Court of California has held that a San Francisco law firm may maintain an action against an insurance company for intentional interference with the contractual relationship created by a contingent-fee contract between the attorneys and persons who retained them to represent them in personal injury claims against the company's insured.

The complaint, which was dismissed by the trial court on a demurrer, charged the insurer with inducing the clients to break the contingent-fee contract and discharge the attorneys. The Court declared that an action will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification, and it concluded that there was no reason why this principle should not also apply to an attorney's contingent-fee contract. "While a client is permitted to discharge his attorney without cause", the Court said, "this is allowed not because the attorney's interest in performing his services and obtaining his fee is unworthy of protection but because of the importance of the client's interest in the successful prosecution of his cause of action." The Court pointed out that the complaint charged that the insurance company induced the repudiation of the contract and that the basis of the action was that rather than the fact that the attorneys were discharged by the clients.

Since the case was decided on a demurrer to the complaint, the Court said it could not consider any alleged justification for the insurance company's action.

(Herron v. *State Farm Mutual Insurance Company,* Supreme Court of California, June 29, 1961, Gibson, J., 56 A.C. 192, 14 Cal. Rptr. 294, 363 P. 2d 310.)

Criminal Procedure . . . *federal injunction*

Although split on the breadth and applicability of the Supreme Court's recent decision in *Mapp* v. *Ohio,* 81 S. Ct. 1684, the Court of Appeals for the Second Circuit has affirmed an injunction barring an investigator for the Waterfront Commission of New York Harbor from testifying against a certain defendant either in proceedings before the Commission or in a state criminal court.

The chain of circumstances leading to the injunction started with the investigation by federal customs enforcement officers of thefts from the piers. During the investigation they searched the home of a hiring agent and longshoreman licensed by the Waterfront Commission, a bi-state agency created by New York and New Jersey. The search was in violation of Rule 41 of the Federal Rules of Criminal Procedure and the suspect was later questioned in violation of Rule 5(a). The state investigator was not present at the search, but at the invitation of the federal agents he attended the interrogation, although he did not participate in it.

The Federal District Court enjoined the federals from testifying in state proceedings "to the fruits of their illegal activities" and extended the injunction to include the state agent "to make its decree effective". The state officer, joined by the New York State District Attorneys Association as *amicus curiae,* claimed this was an unwarranted interference with the state's administration of criminal justice.

The Second Circuit disagreed. It conceded that there was a prineiple of non-interference by the federal courts with state activities in law enforcement, but it said that the principle was overridden in this case by the need to insure compliance by federal officers with the requirements of fair criminal law administration under the Federal Rules of Criminal Procedure. Citing *Rea* v. *U. S.,* 350 U. S. 214, in which a federal narcotics agent was enjoined from testifying in a state court with respect to narcotics seized by him in an illegal search, the Court pointed out that in this case the federal officers attempted to pass on the "fruits of their illegal activity" by calling in state officers at the time of the illegal detention, whereas in *Rea* the passing on of the information was to be at the trial. The Court said there was no difference.

Neither did the fact that the person enjoined in *Rea* was a federal officer and the person here a state officer make a difference, the Court declared. He was "not being enjoined in his capacity as a state official", it remarked, "but as a witness invited to observe illegal activity by Federal agents. . . . [T]hat he happens to be a state official is not, in our view, an excusing circumstance."

The Court split on the question whether the injunction was any longer necessary in view of the Supreme Court's decision in June in the *Mapp* case, where it held that the Fourth Amendment, made applicable by the Fourteenth to the states, precluded the use by a state in a state prosecution of evidence obtained by an illegal search and seizure. The majority said the scope of *Mapp* was unclear as to its application to requirements created by statute or rule, in addition to those arising constitutionally, and to administrative proceedings, such as those of the Waterfront Commission to revoke a license. One dissenting judge, however, felt that the application of *Mapp* to the state prosecutions and hearings was clear, that the accused had his remedy in the state courts to

suppress the evidence and admissions illegally obtained, and that therefore the injunction was unnecessary and should be dissolved.

(Bolger v. *Cleary*, United States Court of Appeals for the Second Circuit, August 4, 1961, Clark, J.)

Criminal Procedure . . . *too much judge*

The Court of Appeals for the Second Circuit, although finding "abundant proof" of a defendant's guilt, has reversed his conviction "because certain remarks and questions of the district judge were, in combined effect, so clearly prejudiced that we cannot say that the defendant received the fair trial to which he was entitled".

The defendant was convicted on ten counts of conspiracy in connection with an allegation that he took civil service examinations and signed identification cards and declarations of honesty for some of his fellow post office employees. His defense was that the fellow employees were lying and that a handwriting expert who testified was confused.

During the trial the judge and the defendant engaged in several running exchanges of words in which the defendant was accused of having a chip on his shoulder and was treated with sarcasm about charging that everyone was conspiring against him and about criticism of his lawyer for the manner in which he was conducting the defense. The Court said this belittled the defendant's case and made his defense "contemptible and ridiculous in the eyes of the jury".

"Pilloried by the court and unprotected by his own counsel who seemed to think that he was on trial himself", the opinion continued, "the defendant could only ride out the storms which the court had provoked. . . . In any event the error is plain and it was of a sort which should not be disregarded. . . . By his biased and intemperate participation in the proceedings the judge denied to the defendant the fair and impartial trial to which our law entitles him."

(U. S. v. *Salazer*, United States Court of Appeals, for the Second Circuit, August 7, 1961, Lumbard, C.J.)

Evidence . . . *husband-wife privilege*

New York's statutory privilege regarding husband-wife communications does not prevent a wife from testifying in her husband's criminal trial that she saw him and some of his friends in the kitchen of their home with firearms, the Court of Appeals of that state has ruled, with three judges dissenting.

The defendant was convicted of grand larceny in the second degree for the theft of some guns and ammunition from a sporting goods store. At the trial and over the objection of the husband-defendant, the wife testified that she entered the kitchen of their home early on the morning of the burglary, observed her husband and two other men there with guns, and told them to get out of the house. She had told the same story before the grand jury. At the trial, moreover, two of the participants in the burglary related the entry of the wife into the kitchen.

The Court affirmed the admission of the wife's testimony on the basis that the communication to her was not confidential and that therefore her testimony was not barred by the New York statute, which requires the communication from one spouse to the other to be confidential in order to be privileged. The Court noted that this was different from the common law rule which completely disqualified one spouse from testifying against the other.

The Court conceded that acts may be protected as "communications" under the privilege, but it found that in this case there was no confidentiality attaching to the so-called "disclosive act" observed by the wife. The Court pointed out that it appeared the wife walked in on the scene unexpectedly and that under those circumstances it could not be said that the husband made a "disclosure" in confidence to her. In addition, the Court said, the communication was made in the presence of third parties and the defendant had himself related the incident in a statement to officers. Under these circumstances, it continued, the public policy to promote confidence between husband and wife would not be served by excluding the wife's testimony.

The three dissenters felt that the communication was confidential by its very nature since the kitchen meeting was obviously a secret one and the communication to the wife "of its purpose and significance was essentially confidential". The presence of third persons, they said, did not destroy the confidentiality.

(New York v. *Melski*, Court of Appeals of New York, June 9, 1961, Burke, J., 10 N.Y. 2d 78, 217 N.Y.S. 2d 65, 176 N.E. 2d 81.)

Labor Law . . . *investigation powers*

In the first test of the Secretary of Labor's investigatory powers under the Labor-Management Reporting and Disclosure Act of 1959 [Landrum-Griffin], the Court of Appeals for the Sixth Circuit has held that the Secretary need not show either "probable cause" or "reasonable basis" for examining a union's records under subpoena.

The act, 29 U.S.C.A. §521, grants the Secretary power to make investigations and inspect records "when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter". The Secretary requested enforcement of subpoenas for records of a Detroit Teamster local, demanding records used by the local for preparation of the organizational report and financial report which the act requires unions to file. The union contended that the Secretary should be required to make a showing of "probable cause" that the statutes were being violated before he could have enforcement of the subpoenas. The district judge agreed with this general theory, although he used the term "reasonable basis", and he refused to enforce the subpoenas when the Secretary presented no evidence.

Examining legislative history, the Sixth Circuit found that Congress had rejected the "probable cause" approach by an amendment of the Act in conference committee because it felt the requirement might hamper the Secretary in making the investigations required by the act. The Court said it would not impose a restriction that Congress rejected, whether the condi-

tion was termed "probable cause" or "reasonable basis".

The statute gave the Secretary sufficient authority to proceed, the Court decided. "The Secretary could not very well perform his statutory duty and determine whether the Act was being violated or about to be violated", the Court added, "without making an investigation. Requiring the Secretary first to establish a probable violation of the Act, as a condition precedent to making an investigation, effectively stripped him of his power to investigate and prevented him from determining whether the Act was being violated or about to be violated. It virtually rendered the enforcement provisions of the Act nugatory."

The Court turned down the union's argument that the subpoenas were too broad. It noted that they required only records which the union was required by statute to keep and that the union had not alleged any oppression or illegal conduct, but had questioned the Secretary's right to make the investigation.

The Court also rejected the union's contention that the provisions of the Act requiring the filing of reports is unconstitutional as violating the commerce clause of the Federal Constitution. The union argued that this was an attempt by Congress to legislate with respect to the internal affairs of a union, which are local in character. The Court answered this by pointing out that the Act contained findings that labor-management relations have a substantial effect on interstate commerce.

(Goldberg v. *Truck Drivers Local Union No. 299,* United States Court of Appeals for the Sixth Circuit, August 16, 1961, Weick, J.)

State Taxation . . . *fairs and horse racing*

A fair just isn't a fair without horse racing, the Maryland Court of Appeals has held in ruling that the portion of the fairgrounds used for horse racing at the Maryland State Fair is exempt from real estate taxation.

The property is owned by the Maryland State Fair & Agricultural Society, which acquired it in 1950 to assure continuation of the state fair when the previous owner threatened to sell the fairgrounds for an industrial site. The first fair held on this location, which consists of 83 acres, was in 1878 and it became known as the Maryland State Fair as early as 1903.

The state conceded that the fair society was an educational or charitable institution, that no part of its net income inured to the benefit of any private shareholder or individual, and that the property was actually used by the fair society, but it contended that horse racing was not a use of the property necessary for the society's educational and charitable work, and therefore the part of the fairgrounds devoted to horse racing, calculated by the taxing authorities as 43 acres, should not be exempt from taxation.

Likening a state fair without horse racing to the play *Hamlet* without Hamlet, the Court declared that the fair was all of one piece and that all of the property came within the legislative intent and objectives of the statute providing for tax exemption. It noted that historically fairs have been a composite of educational and entertainment features, two of the latter being horse racing and the midway. The Court termed these an "integral part and parcel" of the fair.

(Maryland State Fair & Agricultural Society, Inc., v. *Supervisor of Assessments of Baltimore County,* Court of Appeals of Maryland, June 14, 1961, 172 A. 2d 132.)

What's Happened Since . . .

■ The Supreme Court of California on May 29, 1961, vacated the decision of the California District Court of Appeals for the Second District in *Scandinavian Airlines System, Inc.* v. *County of Los Angeles,* 6 Cal. Rptr. 694 (46 A.B.A.J. 1225; November, 1960), holding that the City and County of Los Angeles could levy and collect a personal property tax against foreign-owned and based airplanes flown exclusively in foreign commerce apportioned on the basis of the time spent at Los Angeles International Airport. The Supreme Court (in an opinion reported at 56 A.C. 1, 14 Cal. Rptr. 25, 363 P. 2d 25) held that the "home-port doctrine" should be applied and that "the power to tax airplanes engaged solely in commerce with foreign nations is vested exclusively in the place of true domicile, which jurisdiction may impose a tax on the full value, to the exclusion of property taxation elsewhere, whether upon an apportioned basis or otherwise." The Court ruled, moreover, that the terms of a treaty with Sweden (one of the "home-ports" of the airplanes involved) "prevent the several states from imposing any type of property tax upon airplanes owned, based and registered in *any* foreign country, unless the over-all operations of the owner brings such airplanes within the area of property to be taxed, as such is defined in the treaty" [Court's italics]. Two justices dissented.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The Professional Responsibility of Draftsmen

The recent publication of *Notes on Legislative Drafting*[1] by James Craig Peacock of the District of Columbia Bar is an event of considerable significance. Not only does the small book (let us *not* say "slender volume") bring to us the author's views regarding certain specific problems of drafting, but it also contains some penetrating observations on the duties and obligations of draftsmen as practicing members of the legal profession. This is important, for as Mr. Peacock points out, very little legislation is actually prepared by legislators in these times. Indeed, much of the current product is not even prepared under the supervision of legislators. Rather, as any newspaper reader knows, substantial portions of the legislative program of the present national administration arrive at the Capitol in a series of neat packages of proposed enactments accompanied by presidential messages on the topics for consideration.

If, as is probably the case, these measures as well as those emanating from congressional committees, are drawn by lawyers specializing in the field of legislation, it is indeed true that grave questions of professional responsibility are involved. To a degree they are different from those facing lawyers in private practice, but this circumstance does not make them less important. Thus, Mr. Peacock's discussion, which is one of the few published treatments of the matter, deserves notice. What follows will be largely a comment on his statements together with some additional observations.

Assuming that the draftsman is a lawyer, a question obviously arises as to his client. In one sense of the word, the client is the proponent of the measure being drafted, whether it be an individual, a committee or a business association. However, in a different light, it might be said that the public, or at least that segment of it which is to be subject to the statute, is the interest being represented. In fact, both of these aspects are important and have a bearing on the responsibilities which the draftsman assumes.

Turning first to a consideration of the proponent as the client and of how to serve him, it may be said that a full knowledge of the facts of the problem and of the end to be achieved is essential to a successful result. It is the responsibility of the draftsman to make sure that he has this knowledge. Certainly it is the obligation of the client to make all necessary information available. It is probable, however, that in many instances the client fails to do so, not perhaps because he is unwilling, but because he himself does not understand all of the aspects of the situation. It then becomes necessary for the draftsman by patient and adroit questioning to get the complete story. This, of course, is not peculiar to the legislative process. Many lawsuits have been lost because the client did not divulge essential facts.

When and if the facts have been fully revealed, the draftsman is in a position to advise his client and to prepare the legislation. As Mr. Peacock points out (and here he is joined by many others who have written about drafting) this may involve a long and arduous period of research, which will extend not only to an investigation of other legislation in the area but also to an examination of case law and frequently a consideration of the general "environment" of the proposed measure. If, for example, the bill involves substantial regulation of an economic activity it is necessary for the draftsman to have at least some knowledge of the way in which the regulated industry operates and how a given type of regulation may affect those operations. These are facts too, but frequently cannot be obtained from the client.

It may be mentioned at this point that in fulfilling the obligation to be well informed and thoroughly prepared the draftsman may well encounter complaints from his client. It is a reasonably safe generalization to assert that proponents of legislation are always in a hurry and usually do not understand the meticulous care which must be exercised in preparing bills for enactment. Although the draftsman should not be dilatory, if he yields too readily to pressure the result may be a law which does not effectuate its purpose.

The lawyer-client relationship here, as elsewhere, inevitably involves the extent to which the lawyer may participate in the formulation of policy. It is too easy an answer to say that policy is no concern of his. As Mr. Peacock states,[2] ". . . in practice there exists a vast twilight zone and he [the draftsman] as a lawyer must bring himself to realize that the line of demarcation between policy and drafting in the case of a bill is no more hard and fast than that which he might have great difficulty in precisely defining were he drawing a contract or a will or a deed of trust for a private client." For example, among other things that the lawyer possesses is knowledge of the probable consequences of a given course of action and it is, of course, part of his duty to advise his client of such matters even though they may border on policy determinations.

In his role as guardian of the public interest it would seem that the principal duty of the lawyer-draftsman is to be clear. The burden of communication should be on him or the legislature rather than the persons subject to the law. This is recognized to some extent by the constitutional requirement of definiteness and certainty, but there are surely statutes which meet this requirement but which are still unclear to the reader. Whether a statute must be written in ordinary rather than technical language depends in part on the public for which it is intended but

1. REC Foundation (Washington, 1961).
2. Page 3.

at least it should be understandable by those subject to its rule.

Finally, although this will be questioned by some persons in government, the draftsman should never be guilty of deliberate ambiguity. As Professor Reed Dickerson points out in his book, *Legislative Drafting*,[3] "Quite apart from the direct moral implications of such deception, the action usurps the legislative function. Finally, it just doesn't pay off. The agency involved sooner or later finds itself under a cloud of legislative distrust, and the persons who are affected by the law are unnecessarily confused and delayed."

3. Little, Brown and Company (Boston, 1954).

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

BIRTH CONTROL: At the October, 1960 Term of the Supreme Court, the Connecticut birth control cases *(Poe* v. *Ullman, Doe* v. *Ullman and Buxton* v. *Ullman*, 29 U. S. Law Week 4820, and 367 U. S. 497, decided June 19, 1961) were argued by distinguished counsel. Raymond J. Cannon spoke for Albert L. Coles, Attorney General of Connecticut, and Professor Fowler V. Harper of Yale Law School for the appellants, Poe, Doe and Buxton. However, to the aid of Professor Harper (best known to readers of this department for his excellent series of articles in volumes 99-102 of the *University of Pennsylvania Law Review* upon work the Supreme Court did not do in its 1949, 1950, 1951 and 1952 terms, 40 A.B.A. *Journal* 530) came *amici curiae:* Harriett F. Pilpel, Julia Perles and Nancy F. Wechsler for Planned Parenthood; Osmond K. Fraenkel, Rowland Watts, Ruth Emerson, Melvin L. Wulf and Jerome E. Caplan for the American and Connecticut Civil Liberties Unions; and, last, but not least, none other than our distinguished past President, Whitney North Seymour with Donald Oresman for sixty-six obstetricians and gynecologists.

On the argument, questions from the bench indicated that the Supreme Court would duck the question. For instance, Mr. Justice Frankfurter, commenting upon the intentions of purchasers of contraceptives, remarked:

> A person might not buy them for use. Some people might just want to collect them. People collect all sorts of queer things. Some people collect match boxes. I know a man who collects sausage cases. *(Time Magazine*, March 10, 1961, pages 49-50)

Not surprisingly (certainly not to Professor Harper, an expert on the subject) the Court by Mr. Justice Frankfurter risked being docked in their pay and with straight faces stated (over the objections of Messrs. Justices Black, Douglas, Harlan and Stewart) that neither a case nor a controversy was presented, citing those awful ducking decisions *(Muskrat*, 219 U. S. 346; *Ashwander*, 297 U. S. 288; *Rescue Army*, 331 U. S. 549; *Massachusetts* v. *Mellon*, 262 U. S. 447; *United Public Workers* v. *Mitchell*, 330 U. S. 75, to which they could have added *Colegrove* v. *Green*, 328 U. S. 549, had it not been distinguished, if not repudiated, in *Gomillion* v. *Lightfoot*, 364 U. S. 339, on November 14, 1960).

All of which inspires me to call to your attention the excellent study of the Connecticut birth control act, entitled "Man, His Dog and Birth Control: A Study in Comparative Rights," by George Spelvin in the June, 1961, *Yale Law Journal* (Volume 70, Number 5; $2.50; Address, Fred B. Rothman and Co., 57 Lenning St., South Hackensack, New Jersey). The statute provides that

> any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

As a dog lover, Mr. Spelvin strikes terror to my heart. As all us dog people know, Dr. Stocking of the Upjohn Company has recently announced a new oral contraceptive drug which "by suppressing heat will inhibit the menstruation cycle of the bitch" and reduce the flow of "menstrual fluid which arouses the sexual instincts of the male".

This is a great boon. If only we had had this discovery available in the summer of 1953 when our poodle, Bijou, as pure French as Josephine, met up with an attractive Lookout Mountain Airedale and gave us nine illegitimate puppies!

Alas, George Spelvin points out that this discovery will be unavailable to the dog people of Connecticut except at risk of prosecution. The birth control statute there can be read as applicable to dogs by what Cardozo calls "interstitial legislation". Use of the drug may result in artificial contraception. Bitches are exempt but the persons who administer this drug are the ones who must worry, namely we dog people.

Assuming, therefore, the statute is applicable to us, Spelvin inquires whether the application amounts to a deprivation of due process. He recalls that remark of Chief Justice Appleton: "From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been, there has been his dog.

Consequently, in the context of a

> challenge to the Connecticut birth control statute, the dog-owner's rights would come to the Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements [page 1207].

There are grave questions of dog public policy involved and the statute to be upheld "must be shown to further some legitimate legislative policy" (page 1208). As the Supreme Judicial Court of Massachusetts has observed, birth control statutes "are designed to promote the public morals. . . . Their plain purpose is to protect purity, to preserve chastity. . . ."

Mr. Spelvin points out that "paradoxically, while the purpose of the statute when applied to humans is to discourage promiscuity, its application to dog owners would produce precisely the opposite result. It would effectively prevent a dog owner who desired to curb his dog's promiscuity, from employing this anaphrodisiac to achieve this end."

But,

> if a dog owner is allowed to administer this drug, the bitch, unexpectedly found unappealing by the opposite sex, and thus deprived of her sensual sustenance, may suffer a severe loss of self-confidence and social status. Moreover, since not all dog owners would want to control their pet's passions in this way, an almost unbearable burden would be placed on those bitches to whom the drug was not administered and who, therefore, retained their attraction to males.

As his *peroratio*, George Spelvin calls upon the State of Connecticut to "take an interest in the well-being of *all* the state's dogs" and apply the new statute "to dog owners so as to prevent interference with what Professor Fowler Harper of the Yale Law School (in his Supreme Court brief) calls "the most intimate and sacred experiences in life" (page 1209).

In this, I wish I could join Lawyer Spelvin, but my recollections of nine illegitimate French poodle puppies leads me to believe that the Rhythm System leaves something to be desired. It just does not seem cricket to deprive us dog owners of Upjohn's new drug. I think Whitney North Seymour ought to get seventy-six veterinarians and attack the constitutionality of this vicious Connecticut statute that Spelvin so stoutly defends before it spreads elsewhere. I don't want Harper. I want the Court to work.

CORPORATIONS: The few of us lawyers who still go to court find it hard to understand how the corporate scriveners, who sit in offices writing corporate indentures for a monthly salary twice our annual one, can allow so many of their pet corporate clients to do business in so many states sans qualification therein. It's always seemed to me penny-wise and pound-foolish to refrain from making corporations doing a national business qualify in every state in which they do business.

The point has been brought home solidly by the *Lilly* case *(Eli Lilly* and *Company* v. *Sav-On-Drugs, Inc.* 6 L. ed. 2d 208, 81 S. Ct. 1316, 31 N. J. 591, 158 A. 2d 528). Lilly is an Indiana corporation, and like most states Indiana does not allow a foreign corporation that does business in Indiana to sue on a contract made in Indiana unless it qualifies there. New Jersey, of all the states, alone operates on a reciprocity basis, allowing foreign corporations to sue in New Jersey if their states would accord a New Jersey corporation a comparable privilege.

Lilly sells its pharmaceutical goods in New Jersey to wholesale distributors who sell to retailers. Fair trade agreements with retailers are forwarded to Indiana for execution there, and the wholesalers order their goods from Indiana. However, though it owns no New Jersey real estate, Lilly has an office there with its name on the door and in the lobby of the building. A district manager runs the New Jersey office. He has a secretary and eighteen so-called "detail men" to call upon retailers, hospitals and physicians to promote sales.

Now, I submit, no litigating lawyer would ever believe that under these circumstances, the New Jersey courts would ever hold that Lilly was not doing an *intrastate* New Jersey business, at least when the point was raised in defense of a suit on a contract in a state court in New Jersey. Relying on the Northwestern Cement case *(Northwestern* v. *Minnesota,* 358 U. S. 450), the Supreme Court of New Jersey said that Lilly could not sue in its courts because it was doing an intrastate business sans qualification. Being careful to say Lilly would have been free to sue in New Jersey if it were doing only an *interstate* business, the Supreme Court of the United States affirmed.

The Corporation Journal for August-September, 1961 (Vol. 23, No. 7, pages 123-126), carries an excellent analysis of the *Lilly* case that litigating and especially corporate lawyers should read. Along with it, ask Corporation Trust to send you its valuable pamphlet "What Constitutes Doing Business". Corporation Trust mails the pamphlet and a subscription to its *Journal* free "to lawyers and accountants upon written request to any of the company's offices". Pick up the phone and request both. If Corporation Trust has no office in your town, write it at 120 Broadway, New York 5, New York.

Being a nosey fellow and a never-say-die stubborn litigator, I wondered if Lilly could now qualify in New Jersey and sue Sav-on-Drug, a non-signer, to enforce its New Jersey fair trade contracts pursuant to the provisions of the New Jersey Fair Trade Law. My student, John Holmes in the Washington office of Corporation Trust, refers me to the company's pamphlet, "What Constitutes Doing Business". In all but fourteen states, if your corporate client is doing an *intrastate* business sans qualification, it is free to qualify retroactively and sue on the contract thereafter. Lilly is lucky. Indiana is a state permitting retroactive qualification and under New Jersey's reciprocal statute Lilly is free to qualify and then sue. Why did it not do so, instead of appealing?

For your information, Lawyer Holmes lists the fourteen states that do not permit a corporation to qualify and then sue on a prior contract as: Alabama, Arizona, Arkansas, Idaho, Iowa, Michigan, Mississippi, Missouri, New York, South Dakota, Texas, Utah, Vermont and Wyoming. In addition, you have to watch New Jersey because it is reciprocal.

THURMAN ARNOLD: On June 2, 1961, the ex-Judge Advocate, ex-Legislator, ex-Mayor of Laramie, Wyoming, ex-Dean of West Virginia Law School, ex-Yale Professor of Law, ex-Trust Buster, and ex-Court of Appeals Judge, Thurman Arnold, became seventy years young. As a birthday present, his partner, the well-known antitrust lawyer, Victor H. Kramer, collected, edited and privately published a beautiful collection of his letters and extracts from his briefs—all written since Judge Arnold entered private practice with Abe Fortas in 1945 (in which Paul Porter joined them in 1947).

Victor H. Kramer writes a preface and Mr. Justice William O. Douglas a foreword where he says that Thurman Arnold:

> is as truly American as the Rocky Mountains where he was born. He is as rough and ready in his discourse as he is in his appearance. He is not the Georgetown type who, complete with boutonniere, steps out of a fashion shop. (He lives high on a hill in Alexandria, Va., where his lovely lady, Frances, keeps chickens.) An unfriendly critic once stated, "He looks like he slept in his clothes." . . . When he walked into his class at Yale smoking a pipe, wearing a hat, and leading his dog, he was not producing an act. He was so lost in thought that the amenities escaped him. . . . He is stimulating and annoying; calm and excited; conservative and extreme; simple and ingenious. Always he is brilliant.

Mr. Kramer has collected Arnold's writings under seven heads: Personal History; Whimsy and Pure Fun and Frolic; Herein of Evelyn Walsh McLean (and her diamonds), Ezra Pound, F.D.R., Robert H. Jackson and Walton Hamilton; Social Philosophy; The "Loyalty" Cases; Antitrust; and On Insanity and Obscenity and the Law.

In the second subdivision are two characteristic letters. One is to Thurman's cousin Edwin M. Martin who sent him a Capehart. Here is an abbreviated version:

> Dear Cousin Ed:
>
> The Capehart arrived. . . . The machine responded magnificently and played everything we fed it with great skill and virtuosity until an unfortunate incident occurred which hurt its feelings and caused it to go on a sit-down strike.
>
> The fault was mine. I ought not to have expected such an aristocrat among musical instruments to play cheap inferior records. . . . The thing happened this way.
>
> We tried *La Bohème* which the machine digested with great enthusiasm. I then stuck on one of my favorite boogie-woogie pieces. [Thurman is a devotee of Pee Wee Hunt's Twelfth Street Rag which on the Capitol label has sold over three million copies and he frequently works in his office with the record playing.] The machine promptly bit a circular chunk out of the edge of the record. This should have warned anyone of any sensitivity but I had had a couple of drinks and failed to grasp the delicacy of the situation. I put on Tristan which the machine played superbly. Then I made my fatal mistake. I put on a record of one of my own speeches over Town Hall of the Air. The machine quit cold. It not only refused to play the speech; it has refused to play anything of any kind since my speech was fed to it. . . .
>
> I have apologized but it didn't do any good. I offered to bargain collectively with the machine and even read the Wagner Act to it without any response whatever.
>
> After some thought I think I have hit on a solution. What the machine needs is a couple of drinks of good scotch, which I am sure would put it in a mellow and more reasonable frame of mind. My difficulty is that I can't find where to pour the liquor in. Your instruction book says nothing about it. . . . Will you please wire me instructions exactly how this should be done.

As good as this letter is, I think Thurman's letter to Mrs. Dorothy Clark, wife of Judge Charles Clark, of the Court of Appeals for the Second Circuit, is as good. Here it is, unabbreviated:

> Dear Dorothy:
>
> I am in deep trouble and I need your help. Don't leave me waiting at the church as you did so long ago.
>
> The facts are these: Frances gave a dinner party last night for Bill Douglas and Mercedes. [Justice and Mrs. William O. Douglas] Everything went fine until I went to sleep. When I woke up the guests were all gone and Frances was in bed. I got up very early this morning, very quietly, and thought that I could escape comment by getting my own breakfast and leaving. It didn't work. Before I could get away Frances appeared in the doorway and started shooting rockets, atomic bombs, artillery. I think she also had a flame thrower with her, though I am not sure.
>
> I defended myself the best I could. I said that it was customary for great men to go to sleep at parties, citing the Senior Judge of the Second Circuit, Charles E. Clark, as an authority on the subject. She said, "Charlie never goes to sleep at his own parties. He is always a good host. If you want to go to sleep at other people's parties, I do not mind, but you can't go to sleep at the parties I give for your friends."
>
> I don't think this is a sound distinction. I think that His Honor's example is a good one and justifies my own action. I haven't convinced Frances, however, and I am sitting here debating whether I should go home or get a room in a hotel.
>
> Will you please write Frances immediately and tell her that you think she is completely unreasonable, that you have had experience with the same sort of phenomenon. Tell her, if it is true (and I hope it is), that Charlie has not only gone to sleep at other people's parties, that he has gone to sleep at his own parties, and that this sort of relaxation does no harm to anyone.
>
> The older I grow the more disappointed I get in women. You support them, feed them, buy mink coats and automobiles for them, all your life. And then, in your declining years they turn on you like a wildcat. Outside of yourself, the only really gentle and lovable women I have ever known I have read about in books.
>
> Hoping that you will immediately dispatch a reprimand to Frances, I remain
>
> Affectionately yours,
> Thurman

These two letters give some idea of how enjoyable these letters are and what a wonderful guy Thurman Arnold is.

And I suppose you want to know how to get a copy. I can't tell you. I stole mine. All I suggest is that you write the Judge, himself, or the copyright owner, his partner, Victor H. Kramer, at 1229 19th St., N.W., Washington, D. C., but please don't mention this department. I want to keep my copy. I love it.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, John M. Skilling, Jr., Chairman; John M. Bixler, Vice Chairman.

Recent Developments in Oil and Gas Taxation

By Charles O. Galvin, Dallas, Texas

Two recent developments in oil and gas taxation are of interest not only to those who practice in this field but also to practitioners generally. This discussion will deal with *United States* v. *Stierwalt*,[1] which concerns the association question in oil and gas operations, and TIR's 326, 333,[2] and 338 (September 15, 1961) which concern a re-examination of the Service's position with respect to the income tax consequences of the sale of production payments in ABC transactions.

I

The operating agreement is an organizational arrangement through which the co-owners of the working interest in oil and gas properties jointly carry on the business of drilling, developing and producing. The agreement usually provides for: management through one of the co-owners or through a committee, an election under Section 761 not to be treated as a partnership, and the right in each of the joint owners to take his share of the production in kind. In connection with the latter, the Internal Revenue Service position has been that if the operator markets the product for the account of the other joint interest owners under revocable agency powers, then there is no joint profit objective, and that consequently the arrangement is not subject to tax as an association taxable as a corporation.[3]

The business practice in the industry is that the purchasing pipeline company prepares division orders pursuant to which payments for the shares of production are made directly to each interest owner. The operator pays expenses for the joint account and is reimbursed through regular billings to the co-owners.

In *Stierwalt*, the fact pattern began with the rather typical situation in which certain investor groups consisting of about seventy-six persons became interested in oil and gas development in Wyoming. The investors negotiated with parties who had experience in the oil and gas business. It is important in order to evaluate the case to consider the documentation of the transactions as the undertaking developed. In summary form the chronology of events was as follows: (1) Stierwalt and another, having experience in the oil and gas business, took title to certain oil and gas leases in 1953 for the benefit of the investors; (2) Stierwalt and his associate then entered into an agreement with one Dunbar to drill and operate for the life of the properties; (3) the arrangement between the investors and Stierwalt was formalized by a trust device by which Stierwalt and two of his associates were designated as trustees for the group; (4) when the investors learned that the trust device was inappropriate for assuring them of the right to take deductions individually for expenses of the venture, they revoked the trust on December 30, 1953; (5) Stierwalt and his two associates then entered into written agreements with each investor pursuant to which undivided interests in the properties formerly held in trust were conveyed to each investor who in turn agreed to pay for his interest and his share of drilling, development and operating costs. These agreements contained no termination date; they bound the heirs, successors and assigns of the parties. The agreements provided that each investor had the right to take his share of oil and gas production in kind or separately to dispose of his share; (6) contemporaneously with the execution of the agreement each investor executed a power of attorney giving the three former trustees broad agency powers revocable on ten days' notice; (7) for the year 1954 Stierwalt and his wife as members of the group sought to deduct for income tax purposes their share of the intangible drilling and development costs attributable to the venture. The deduction was disallowed on the grounds that the organizational arrangement was an association taxable as a corporation and that expenses, therefore, were deductible by the entity and not by the individuals.

Government counsel in their brief stated that the existing administrative rulings required not only that each interest owner have the right to take his share of production in kind but also that any delegation of authority to the operator or to any other person be revocable at will or in any event not commit the owners for a period in excess of one year. In the instant case counsel argued that, notwithstanding that the agency was revocable on ten days' notice, the agents, so long as their agency existed (a period of at least ten days), could bind the principals to long term commitments.[4]

The Court of Appeals for the Tenth Circuit, reversing a district court decision,[5] held for the Government.[6] The court stated: (1) that the essence of the venture was a joint investment with the goal of a joint profit; (2) that centralized and continuing management was contemplated and accomplished in fact although no specific provision of the agreement indicated how successors in management were to be chosen; (3) that the broad powers granted by the powers of attorney contemplated an authoritative use for the benefit of all investors and in conjunction with identical grants of

1. 287 F. 2d 855 (10th Cir. 1961).
2. 1961—31 I.R.B. 15 and 1961—34 I.R.B. 38.
3. I.T. 3930, 1948 C.B. 126; I.T. 3948, 1949-1 C.B. 161.
4. In 1956, Stierwalt and his two associates entered into a five-year contract for the marketing of gas and a three-year contract for the marketing of oil. It was pointed out by the district court that when the arrangement was made with Dunbar in September, 1953, apparently Dunbar was given the right to market the production, but that this right was not taken seriously since Stierwalt and his two associates actually negotiated the above contracts. 181 F. Supp. 770, 775 (D. Wyo. 1960).
5. 181 F. Supp. 770 (D. Wyo. 1960).
6. 287 F. 2d 855 (10th Cir. 1961).

power from all; (4) that the designation of agency could not carry with it the true personal consideration usual with such a relationship; (5) that the power of the agent to bind the investor was specifically granted to allow accomplishment of objectives over a long-term period; (6) that the technical right of the investor to take production in kind was admittedly impractical in use; (7) that the allowable revocation of the agency after notice, unless exercised *en masse*, would not necessarily change the utility of the organization nor its existence as a continuing entity in fact.[7]

The first point restates one of the commonly accepted tests of association status: joint profit objective. The remaining points relate to the particular documents which established and implemented the legal relationships in the principal case. What the court seems to be saying is that because there were *in fact* centralized management, broad powers of agency to commit the principals over a long-term period, and no taking of production in kind, the principals were bound to these conditions. But may it not be argued with equal vigor that these conditions existed because the principals through free exercise of choice under the overall arrangements willed them so from day to day? The fact that a continuing right is not asserted is not a waiver of it. It cannot be gainsaid that if the agency were granted and then revoked by the giving of ten days' notice, there would be ten days within which the agent might bind the principals to commitments extending beyond the term of the agency; yet to some extent this argument seems attenuated by the realities of business dealing. A pipeline purchasing company with foreknowledge of all the facts would be chary, to say the least, of entering into a long-term contract with an agent who acts under such a revocable power and whose principal has in a contemporaneous agreement reserved his right to take the product in kind. The contract would derive its enforceability not through the agent's power but through the ratification by the principal of the agent's acts and the forbearance by the principal of the exercise of a right.[8]

It is difficult to assay the impact of this decision on the usual oil and gas operating agreement. The broad language of the opinion is not responsive to the somewhat unusual instrumentation of the transaction in the case. The Government was willing to apply the criteria for association status as found in the published rulings; the opinion, however, beclouds the effectiveness of such usual provisions as those reserving production in kind or those reserving powers of revocation although not exercisable *en masse*. The decision should be read against the final regulations on definitions which are consistent with prior rulings in regard to the operating agreement.[9]

II

The ABC transaction is by now familiar to all because of the recent publicity about it. A and B have negotiated a price of $100,000 for the leasehold equipment, and they have agreed that the value of the minerals in place is $1,000,000. They agree to an arrangement pursuant to which A sells the depreciable equipment to B for $100,000 cash and the operating, or working, interest to B for $200,000 cash. The sale of the leases is subject to a retention, exception or reservation by A in the instruments of assignment and conveyance of a limited overriding royalty, or production payment, in the amount of $800,000, plus an additional amount equivalent to 6 per cent of the unpaid balance of the production payment determined from month to month. The production payment is payable out of 75 per cent of the oil and gas attributable to the interest in the leases theretofore owned by A. A and B discuss the transaction with representatives of a financial institution, who refer them to an organization, C, which may be a trust fund, investment group, or other entity interested in the purchase of income-producing investment-type properties of good quality. C usually arranges for the funds for the purchase of the production payment from A by borrowing the purchase price from the financial institution; and in this case, assume that he executes a note bearing interest at 5½ per cent and a mortgage of the production payment as security for the loan.

B, the purchaser of the working interest, does not contractually commit himself to A to find purchaser C or to procure for C the funds from the financial institution. B, moreover, does not commit himself to guarantee the amount of the production payment nor to guarantee the payment of notes executed by C to the financial institution. Throughout the negotiations preceding the sale, however, A and B do co-operate with C in order to facilitate the transaction relating to the sale of the production payment and the mortgaging thereof to secure the purchase money.

With respect to the A-B transaction A's sale of his leasehold interests has been treated as a sale of his entire operating rights in the properties. His basis is allocated between the production payment retained and leases sold subject to the production payment in accordance with their respective values. The gain on the sale of the working interest has been accorded capital gains treatment since it is a sale of real property used in the trade or business.[10] After the transfer to B the income from the sales of oil and gas attributable to the interest originally owned by A is now allocated 75 per cent to the production payment and 25 per cent to the working interest.[11] If the A-C transaction never occurred, A and B would include in gross income their respective shares of production and determine their deductions for cost depletion or percentage depletion under the usual statutory rules. This division of income has been determined in transactions involving other than mineral sales.[12]

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7. 287 F. 2d 855, 859.

8. See Rev. Rul. 56-542, 1956-2 C.B. 327 (relating to "cost companies"); Sneed, *More About Associations in the Oil and Gas Industry*, 33 Texas L. Rev. 168 (1954); Williams, *Joint Operation of Jointly Owned Natural Resources*, X-3 Oil & Gas Tax Q. 149 (1961).

9. A test of centralization of management means continuing exclusive authority. Regs. §301.7701-2(c). The absence of either associates or an objective to carry on business for joint profit will avoid association classification. Regs. §301.7701-2(a)(2). It would seem that an express reservation of a right in each co-owner to take his share of production in kind negates an intention to carry on a business for joint profit. See Comment, *Associations: Stierwalt, I.T. 3930 and Regulations*, 10 Oil & Gas Tax Q. 177 (1961).

10. *Commissioner* v. *Fleming*, 82 F. 2d 324 (5th Cir. 1936); I.T. 3693, 1944 C.B. 272.

11. *Thomas* v. *Perkins*, 301 U. S. 655 (1936); see *Palmer* v. *Bender*, 287 U. S. 551 (1933); G.C.M. 22730, 1941-1 C.B. 214.

12. *Ashlock*, 18 T.C. 405 (1952) *acq.*, 1952-2 C.B. 1; See Grayck, *Taxing Income That Is Applied Against the Purchase Price*, 12 Tax L. Rev. 381 (1952).

The A-C transaction is a sale by A of his entire interest in the production payment, and the latter has been treated as an investment in real property, a capital asset, the sale of which is entitled to capital gains treatment. With respect to the A-C transaction the question has been presented as to whether or not *Commissioner* v. *P. G. Lake, Inc.*[13] indicates an ordinary-income rather than capital-gain result. Prior to *Lake* the cases held that ordinary income would be attributed to the transferor if recurring receipts were assigned or sold and the underlying asset producing the receipts were retained.[14] Moreover, where the underlying asset was transferred in combination with a sale of accrued income thereon, the courts often fragmented the transaction into a capital transfer and an assignment of income.[15] On the other hand, if the sale or assignment covered a substantial property interest which consisted of recurring receipts, the taxpayer having completely divested himself of ownership and control, then the courts have held that a capital transfer was effected.[16] The fact that a sale or exchange of property has been made at an amount equal to the discounted value of the future stream of income is not alone a criterion for denying capital gains treatment. A share of stock may be worth more if the dividend rate is increased; however, a profit on the sale is investment profit, not a realization of current investment income.[17] The purchaser will realize the investment income since it is he who undertakes the risks of the future. As to the seller the transaction is closed: title and economic control are transferred to the purchaser.[18]

Lake and its companion cases[19] confirmed an administrative position taken as early as 1946[20] that an assignment of a production payment carved out of a larger economic interest is an assignment of anticipated income. Thus *Lake* reaffirms the orthodoxy that sales of recurring receipts where the underlying income-producing asset is retained is an income, not a capital, transfer.

An analysis of post-*Lake* cases demonstrates that the courts in citing *Lake* are reading the case as consistent with the prior stream of decisions and not as new and novel doctrine sheering off from previous traditions.[21] *Lake* dealt with carved-out, not retained, production payments. An application of *Lake* to a non-carved out pattern would place *Lake* in conflict with *Blair*, and to some extent inconsistent with *Thomas-Perkins*, cases which *Lake* did not purport to overrule and cases of which Congress has been cognizant in reenacting the revenue laws from time to time. A's sale to C is a realization of investment profit on the value of minerals in place, not a realization of income.[22]

Suppose that A sells his entire interest in the leases to C without retaining a production payment, and C thereafter, in a separate transaction, assigns the leases to B, retaining the production payment. In such case A has in one transaction disposed of his entire interest. B and C own the operating and production payment interests, respectively. The result of the transaction is the same; yet there has not been a separate sale of a production payment to which *Lake* could be applied. It would seem that such formalistic changes should not produce different tax results.

With respect to the income tax consequences as to B and C, B, the holder of the operating interest subject to the outstanding production payment, is required to include in gross income the proceeds of the sales of oil and gas attributable to his property interest. C will include in his gross income the proceeds of the sales of oil and gas attributable to the production payment. In accordance with custom and practice in the industry, the purchasing pipeline company prepares transfer orders which recognize the respective shares of each month's production.[23]

Whether C purchases the production payment immediately following the A-B transaction or some years later would seem to make no difference as to the separability of the income attributable to the two property interests. In either case B has no title to the minerals which will discharge the production payment. C must look solely to the production payment for recovery of his cost, and the lending institution looks to C, and not B, for repayment of its loan. The mutual co-operation of A, B and C in their negotiations facilitates the consummation of the transaction. Nevertheless, the rights and duties of the parties are fixed in the final instruments into which all prior negotiations are merged.[24] These instruments cannot be disregarded; they do fix the separateness of title, of risk, of right-duty relationships, of accountability for receipts, and of economic control. C is not B's agent, nor is B C's agent.[25]

If C or his lender have collateral guaranties from B or if they may look to other assets for the satisfaction of the production payment, the transaction A-C is merely a security device for the benefit of B, and B would report the income attributable to the production payment.[26]

The ABC transaction has had the benefit of the reasoned elaboration of administrative and judicial processes. Choices have not been made fortuitous-

13. 356 U. S. 260 (1958).

14. *Helvering* v. *Horst*, 311 U. S. 112 (1940).

15. *Watson* v. *Commissioner*, 345 U. S. 544 (1953).

16. *Blair* v. *Commissioner*, 300 U. S. 5 (1937).

17. See Surrey and Warren, FEDERAL INCOME TAXATION 770-73 (1960); Surrey, *Definitional Problems in Capital Gains Taxation*, 69 HARV. L. REV. 985, 1007 (1956). The distinction between investment profit and investment income is supported by Mr. Justice Douglas' statement in *Lake* that "consideration was paid for the right to receive future income, not for an increase in the value of the income-producing property" 356 U. S. 260, 266.

18. Surrey and Warren, *op. cit. supra* note 17 at 770.

19. *Fleming* v. *Commissioner*, *Commissioner* v. *Weed*, *Commissioner* v. *Wrather*, *Scofield* v. *O'Connor*, 356 U. S. 260 (1958).

20. G.C.M. 24849, 1946-1 C.B. 66; see I.T. 3935, 1949-1 C.B. 39; I.T. 4003, 1950-1 C.B. 10.

21. See, for example, *Commissioner* v. *Gillette Motor Transportation*, 364 U. S. 130 (1960) (sales of recurring receipts where underlying assets retained); *Commissioner* v. *Phillips*, 275 F. 2d 33 (4th Cir. 1960) (sales of assets in combination with accrued income); *Metropolitan Building Co.* v. *Commissioner*, 282 F. 2d 592 (9th Cir. 1960) (sales of recurring receipts where no underlying asset retained).

22. Surrey and Warren, *op. cit. supra* note 17 at 770.

23. See *Thomas* v. *Perkins*, 301 U. S. 655 (1936); *Kline* v. *Commissioner*, 268 F. 2d 854 (9th Cir. 1959).

24. See Schoenbaum, *Substance and Form in Assignment of In-Oil Rights and other Mineral Interests*, N. Y. U. 17th INST. ON FED. TAX. 443 (1959). As has been suggested earlier in the text A could sell his entire interest to C, and thereafter C would assign to B reserving the production payment. The C-B transaction is precisely like that in *Thomas* v. *Perkins*, 301 U. S. 655 (1937).

25. See *Commissioner* v. *National Carbide Corp.*, 336 U. S. 422 (1949), and similar cases.

26. *Anderson* v. *Helvering*, 310 U. S. 404 (1939). Production payments which entitle the owner to look to other than production for recoupment of his investment are not regarded as "true" production payments. See Appleman, *Taxes in Sales and Assignments of Leases*, SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON OIL AND GAS LAW 427, 446 (1949). See for the loan analogy *Commissioner* v. *Slagter*, 238 F. 2d 901 (7th Cir. 1956).

ly but on the basis of rational analysis. Accordingly, it would seem that any change in Service policy should proceed cautiously and not precipitously. If the net effect of a given transaction is the sale of a carved out production payment or some form of loan transaction in disguise, then substance may always be considered over form to protect the fisc.[27] So long, however, as the transaction fits into the conventional pattern of a sale by one party of his entire interest in separate transactions to two others, the tax consequences as to A, B and C would seem to be dictated rather clearly by rulings and decisions now extant.

27. See *Gregory* v. *Helvering*, 293 U. S. 465 (1935).

OUR YOUNGER LAWYERS

John G. Weinmann, New Orleans, Louisiana, Secretary, Junior Bar Conference, Editor

Résumé of Junior Bar Conference Annual Meeting

The Junior Bar Conference of the American Bar Association held its 27th Annual Meeting at the Statler-Hilton Hotel in St. Louis, Missouri, in conjunction with the Association's Annual Meeting, August 3-8. Two hundred and seventy Conference members were registered as well as 119 wives of members. William Reece Smith, Jr., of Tampa, who concluded his term as National Chairman of the Conference, presided at meetings of the General Membership and Executive Council, while George B. Raup, of Springfield, Ohio, retiring Speaker of the Conference Assembly, presided at the meetings of the latter body.

National officers elected. Officers for the 1961-62 year were elected at the final business session of the Conference. Kenneth J. Burns, Jr., of Chicago, Illinois, was elected National Chairman. During the past year, he served as Vice Chairman, and in prior years he was a member of the Executive Council, Director and Secretary in addition to other services rendered in behalf of the Conference. He is a past Chairman of the Committee on Younger Members of The Chicago Bar Association, and a member of the Board of Managers of that Association. He is also a member of the Executive Committee of the Illinois State Bar Association's Antitrust Section.

The newly elected Vice Chairman is James R. Stoner, of Washington, D. C., who served as Secretary of the Conference last year and also has served as a member of the Executive Council and a Director. He has served as Chairman of the Junior Bar Section of The Bar Association of the District of Columbia and as a member of the American Bar Association's Membership Committee.

John G. Weinmann, of New Orleans, Louisiana, is the newly elected Secretary. He has served as a member of the Executive Council, Clerk of the Conference Assembly and was one of the participants in the Personal Finance Debate at this year's Annual Meeting. He is a member of the American Bar Association's Standing Committee on Customs Law and is a member of the House of Delegates, Louisiana State Bar Association.

The general sessions of membership considered the amendment of the By-laws of the Junior Bar Conference, making the succession from the position of Vice Chairman to Chairman automatic, taking effect at the annual meeting in 1962, subject to the approval of the House of Delegates. The general membership, at its final session, also considered the problem of choosing Section Delegates to the House of Delegates of the Association in light of a proposed change in the seating of delegates which gave two additional seats to the Junior Bar Conference for a total of three Section Delegates.

Conference Assembly Elections. In a contested election for the office of Speaker, Wayne S. Millsap, of St. Louis, Missouri, a past chairman of the Junior Section of the Bar of St. Louis, defeated John J. Thomason of Memphis, Tennessee, by a close margin. Mr. Millsap was chairman of the Junior Section of the Bar of St. Louis Host Committee and a member of the Host Committee of the Bar of St. Louis. He has also served as chairman of the Conference's By-Laws and Rules Committee.

George C. Winn, of Tampa, Florida, was elected Clerk of the Conference Assembly by acclamation. He has served on the Conference's Law Day—U.S.A. Committee and is active in the Tampa and Florida Bar Associations.

Action by the Conference Assembly. In addition to the elections described above, the Conference Assembly considered and took action upon several important Conference programs and other matters of importance to the legal profession. Among other things, resolutions were adopted by the Assembly reiterating Conference support of H.R. 10, Voluntary Pension Plans for the Self-Employed, and reaffirming the Conference's stand in seeking compensation of assigned counsel in the defense of indigents accused of crime in Federal District Courts. The Assembly also adopted a resolution setting forth standards for a model code for judicial retirement and disability.

In other resolutions adopted by the Conference Assembly, it

Continued its support of pending legislation to establish a Judge Advocate General's Corps in the United States Navy;

Thanked the Junior Section of the Bar Association of St. Louis for the excellent program for the 1961 Annual Meeting;

Expressed the appreciation of the Conference as a whole for the efforts of Mr. Smith as Chairman of the Conference during the past year.

The following junior bar organizations were approved by the Assembly

for affiliation with the Junior Bar Conference.

Calhoun-Kalamazoo Young Lawyers Association (Michigan); The Younger Section of the East St. Louis Bar Association, Illinois; Berrien County Barristers Association, Michigan; Pasadena Young Barristers, California; Barristers Club of San Diego, California.

New Executive Council Representatives. Executive Council representatives were elected to fill vacancies in the odd-numbered council districts and to fill the vacancy resulting from the resignation of the Tenth District representative, Winton A. Winter, of Ottawa, Kansas. Those elected to fill these vacancies were the following:

Samuel A. Wilkinson, Boston, Massachusetts, First District; Arthur W. Liebold, Jr., Philadelphia, Pennsylvania, Third District; Jerome Steen, Jackson, Mississippi, Fifth District; Gerald J. Kahn, Milwaukee, Wisconsin, Seventh District; Edward E. Kallgren, San Francisco, California, Ninth District; Ted J. Davis, Oklahoma City, Oklahoma, Tenth District; Robert O. Hetlage, St. Louis, Missouri, Eleventh District.

Awards of Achievement Winners Announced. The (State) Junior Bar of Texas was named as the State Junior Bar of the Year by a panel of judges comprising the Awards of Achievement Committee. The past year's Chairman of the Texas Junior Bar was B. D. St. Clair, of Austin. The Junior Bar Section of the State Bar Association of Connecticut, David W. Goldman, of New Haven, Chairman, received honorable mention, and the Award of Progress went to the Junior Bar Section of the Florida Bar, William R. Colson of Miami, Chairman.

The Milwaukee Junior Bar Association, John S. Sammond, President, received the Award of Local Junior Bar of the Year in the competition for cities over 500,000 population. The Junior Bar Section of The Bar Association of the District of Columbia, Kenneth Wells Parkinson, Chairman, received honorable mention in this category. The Junior Bar Committee of the Cleveland Bar Association, William Falsgraf, Chairman, was named winner of the Award of Progress; and the Junior Bar Section of the Dade County Bar Association (Miami), Frank A. Howard, Jr., President, received Honorable Mention for the Award of Progress.

The Junior Bar Section of the Lawyers Association of Kansas City, Robert Olsen, President, was named the Local Junior Bar of the Year in cities of less than 500,000 population. The Austin Junior Association, Jack Garey, of Austin, Texas, President, received Honorable Mention; and the Young Lawyers Section of Genesee County, Flint, Michigan, Harold E. Resteiner, Chairman, received the Award of Progress in this category.

Five state junior bar organizations, nine junior bar organizations in cities over 500,000 and seven such organizations in cities under 500,000 submitted entries in this year's competition. Although the number of entries in the state competition decreased slightly, there was a larger number of entries in the two other categories.

The traditional Awards of Achievement Workshop was held Sunday morning, August 6. Representatives of the junior bar organizations which had submitted applications in the competition reviewed the outstanding programs described in the entries. The topics presented and the representatives who participated were the following:

Promotion of Legislation—Stewart Bohan of the Junior Bar Section of the Connecticut State Bar; Trial by Jury—U.S.A.—Ben Pickering of the State Junior Bar of Texas; J. P. Educational Program—Anthony J. Mansour of the Young Lawyers of Genesee County (Flint) Michigan; World Peace Through Law Seminar—Kenneth Wells Parkinson of The Bar Association of the District of Columbia; Organization of the San Francisco Junior Bar—Quentin L. Kopp of the Barrister's Club of San Francisco, California; Milwaukee Reports—Francis J. Demet of the Milwaukee Junior Bar organization; Co-operation with State Law Schools—Lewis H. Hill III, of the Junior Bar Section of the Florida Bar; Legal Aid Branch Office—Robert B. Olsen of the Junior Section, The Lawyers Association of Kansas City, Missouri; Public Relations, re Anti Loan Shark—Ben Pickering of the State Junior Bar of Texas; The Watchdog Program—Francis J. Demet of the Milwaukee Junior Bar Association; Bridge-the-Gap Program in a Small State—Gary Joe Triplett of the Junior Bar Section of the West Virginia Bar Association.

Personal Finance Debate. Carl W. Nielsen, of Hartford, Connecticut, and John G. Weinmann, of New Orleans, Louisiana, the winners, were paired against William R. Cogar, of Richmond, Virginia, and C. Paul Jones, of Minneapolis, Minnesota, in the Fifteenth Personal Finance Law Debate presented by the Conference on Personal Finance Law in co-operation with the Junior Bar Conference. The purpose of this debate is to dramatize a legal problem of current importance in the field of consumer credit.

Program notes. The Conference was privileged to have three distinguished representatives of the Bars of other countries as participants in the program. The Right Honorable Lord Evershed, Master of the Rolls, London, England, briefly addressed the Annual Meeting Luncheon on Saturday, August 5 at which Berl I. Bernhard, Staff Director of the Commission on Civil Rights, was the featured speaker. Mr. Bernhard graciously consented to be a last minute replacement for former President Truman, who had to withdraw because of sudden illness. Mr. Bernhard's speech was well presented and the luncheon audience was made aware of the functions of the Civil Rights Commission as well as the Civil Rights problems throughout the United States. Dr. Carlos Arosemena Arias, of Panama City, Republic of Panama, President of the Inter-American Bar Association, attended the Conference Assembly on August 7.

Kenneth G. Houston, of Winnipeg, Canada, President of the Canadian Junior Bar, represented that country at the annual reception and luncheon in honor of state and local Junior Bar Presidents and their wives. He gave an excellent talk on Canadian-United States relations pointing out that there was no real reason for Canadian apprehension concerning U. S. intentions toward Canada.

Proceedings of the House of Delegates: St. Louis, Missouri, August 7–11, 1961

This is a full summary of the proceedings of the House of Delegates, the governing body of the American Bar Association, at the 84th Annual Meeting of the Association held in St. Louis beginning on August 7. There are some 250 members of the House, composed of State Delegates, one elected by Association members in each state, representatives of all state bar associations, and a number of other organizations of the legal profession and individual office holders *ex officio*. Each Section of the Association has one delegate. The summary contains the full text of all resolutions adopted by the House. These resolutions are the official policy of the Association.

First Session

THE HOUSE OF Delegates of the American Bar Association convened for its first session at the 84th Annual Meeting at 2:00 P.M. on Monday, August 7, 1961. All the meetings of the House were held in the Chase Club of the Hotel Chase in St. Louis. Osmer C. Fitts, of Brattleboro, Vermont, the Chairman of the House of Delegates, presided.

After the call of the roll by the Secretary and the approval of the roster, Herbert G. Nilles, of Fargo, North Dakota, the Chairman of the Committee on Credentials and Admissions, presented nine new members of the House as follows: John R. Connolly, Alaska Bar Association; Howard L. Williams, Delaware State Bar Association; Archibald Cox, the Solicitor General; Emory H. Niles, Maryland State Bar Association; Fred H. Norton, Jr., Boston Bar Association; Edward A. Smith, The Bar Association of Baltimore City; Charles G. Morgan, Tennessee Bar Association; Henry F. Black, Vermont Bar Association; and William S. Richardson, Bar Association of Hawaii.

On the motion of Joseph D. Calhoun, of Media, Pennsylvania, the Secretary of the Association, the House voted to approve the record of the 1961 Midyear Meeting of the House.

The members then stood for a moment in tribute to the following former members of the House who had died in the past year: Tappan Gregory, of Chicago; Lewis C. Ryan, of Syracuse, New York; Gerald Walsh, of New Bedford, Massachusetts; J. B. Patterson, of Wichita, Kansas; R. E. Robertson, of Juneau, Alaska; and Floyd E. Thompson of Chicago, Illinois.

On motion of Philip C. Ebeling, of Dayton, Ohio, the Chairman of the Committee on Rules and Calendar, the House adopted the printed calendar as the order of the day except for a few items that were designated as special orders.

Report of the President

Whitney North Seymour, of New York City, the President of the Association, then delivered his report. He called attention to the growth of the Association in the past twenty-five years, from 28,228 members in 1936 to more than 102,000 as of June 30. He declared that his travels throughout the country had convinced him that "there is a sense of drawing together in the Bar between the local, state and national Bar" which was evidenced by the growth of the Association.

Election of Officers

The House then elected the following officers and members of the Board of Governors. Those elected had been nominated by the State Delegates at the Midyear Meeting last February.

President-Elect, Sylvester C. Smith, Jr., of Newark, New Jersey;

Secretary, Joseph D. Calhoun, of Media, Pennsylvania;

Treasurer, Glenn M. Coulter, of Detroit;

Member of the Board of Governors, Third Circuit, William Poole, of Wilmington, Delaware;

Member of the Board of Governors, Fifth Circuit, William B. Spann, Jr., of Atlanta;

Member of the Board of Governors, Ninth Circuit, J. Garner Anthony, of Honolulu.

Osmer C. Fitts
Chairman, House of Delegates

Grauman Marks

President Seymour Reports to the House

Board of Elections

Chief Justice John R. Dethmers, of Lansing, Michigan, reported for the Board of Elections of which he is the Chairman. Noting that the Board had tabulated the votes in the election for State Delegates and that the results had been published in the July issue of the *Journal*, Chief Justice Dethmers said that Lewis C. Ryan, the candidate for State Delegate from New York who received the plurality of the vote from that state, had died two days before the polls closed. Accordingly, the Board of Elections had refused to declare any winner in New York, Judge Dethmers said. Under Article VI, Section 5 of the Association's Constitution, the Board of Elections has power to count the ballots and announce the result, he continued, and in the Board's view this is the limit of its powers and it was up to the House to determine what should be done.

On Chief Justice Dethmers' motion, the House voted to approve the report.

Joseph D. Stecher, of Chicago, the Executive Director of the Association, declared that, in his opinion, under the Association's Constitution, the senior bar association delegate from New York State would serve as interim State Delegate until the regular election next spring.

Sylvester C. Smith, Jr., of Newark, New Jersey, declared that it was a "misfortune" that New York should be deprived of its State Delegate for so long. He moved that the Board of Elections be instructed to proceed to conduct an election within four months to fill the vacancy.

Mr. Stecher said that the motion was out of order because the Constitution prescribes the time for nominating and electing state delegates, and Mr. Smith's proposal envisaged a different time.

The Chair then ruled Mr. Smith's motion out of order.

Report of the Treasurer

Glenn M. Coulter, of Detroit, the Treasurer, reported that the Association's financial matters were "doing very well. We have had excellent cooperation from the heads of Sections . . . and help from the active Chairmen in relation to trying to utilize our funds well", he said.

Budget Committee Reports

The report of the Budget Committee was given by its Chairman, Robert K. Bell, of Ocean City, New Jersey. Mr. Bell agreed with the Treasurer that the Association's financial condition was excellent, "even though we used a large portion of our surplus in connection with the new addition to the building in Chicago".

Editor-in-Chief of the Journal

Richard Bentley, of Chicago, the new Editor-in-Chief of the *Journal*, made a short oral report to the House. Recalling the death in April of his predecessor, Tappan Gregory, Mr. Bentley said, "We believe the *Journal* flourished under his leadership. We, on whom has descended the responsibility of carrying on that work, are unwilling to accept any lower standard than the standard he set. It is our purpose not merely to consolidate the gains that have been made, but to move forward and to have the *Journal* show progress and improvement."

Amendments to Constitution, By-Laws

The House then turned to five proposals to amend the Constitution and By-Laws of the Association. The amendments offered were drafted by five different committees of the Association, including the Committee on Rules and Calendar, Scope and Correlation of Work, Membership, Economics of Law Practice, and the Special Committee To Consider Amendments to the Association's Constitution and By-Laws. The proposals were extensive, and some of them proved to be quite controversial. The House spent the remainder of the first session and part of the second debating them.

Mr. Ebeling, the Chairman of the Committee on Rules and Calendar, presented paragraphs A and B of Amendment I which, as adopted by the House, read as follows*:

A. CLARIFICATION OF QUALIFICATIONS FOR MEMBERSHIP

Amend the Constitution, Article II, Section 1 by adding after the word "State" in line 2 thereof the words "or United States territory or possession", so that the first sentence of Section 1 will read as follows:

Section 1. Qualifications. Any person who has been duly admitted to the Bar of any State *or United States territory or possession* and is of good moral character shall be eligible to membership in the Association.

B. CENSURE, SUSPENSION OR EXPULSION OF MEMBERS

(1) Amend the Constitution, Article II, Section 4, so that present lines 1-5 thereof read as follows:

The Board of Governors may censure, suspend or expel any member for cause *upon the recommendation of the Committee on Professional Grievances after a hearing held under the direction of that committee, in which such person has been given full opportunity to be present and be heard in his own defense. The Board of Governors* may suspend or drop from membership any member for non-payment of dues.

(2) Amend the By-Laws, Article X,

*Italics in the text of the amendments indicate new language. The numbered lines do not correspond to the numbered lines in the Annual Report and in the Advance Program because of the difference in column width.

Section 7(u)(3), so that the final sentence of Paragraph (3) (lines 44-50 thereof) will read as follows:

After a hearing thereon *conducted* either by this Committee or by its appropriate Circuit Grievance Committee, *at which the accused member shall have been given full notice and ample opportunity to be present and be heard in his own defense,* this Committee only shall recommend to the Board of Governors the censure, public or private, or the suspension or expulsion of the member; and the censure, suspension or expulsion shall become effective on approval of *the Committee's recommendation* by the Board of Governors.

Mr. Ebeling explained that Paragraph A simply provided that members of the Association could be elected from United States territories or possessions, and not merely from one of the fifty states. Paragraph B, he said, was being added because the Committee on Professional Grievances has had trouble with some members when the Committee attempts to censure or suspend them because the complaint is made that due process has not been accorded.

The House voted to adopt the proposals, with one change suggested by James L. Shepherd, Jr., of Houston, Texas, which was accepted by the Committee. Paragraph B as originally drafted provided that a member against whom a complaint is made should be accorded a "full" hearing, with "full notice" and "ample opportunity" to be present. Mr. Shepherd said that the use of the words "full" and "ample" might allow for some delaying tactics, and he suggested the word "reasonable" instead.

Paragraphs C and D were presented by William Poole, of Delaware, the Vice Chairman of the Rules and Calendar Committee. The paragraphs read as follows:

C. COMPLIMENTARY RESOLUTIONS, AWARDS AND CITATIONS

Amend the By-Laws, Article V, Section 3, by adding at the end thereof the words shown in italics so that Section 3 will read as follows:

Section 3. Complimentary Resolutions. No resolution complimentary to an officer or member for any services performed, paper read or address delivered, shall be considered by the Assembly, the House of Delegates, or any Section of the Association. *No Section or Committee shall make awards or citations to any member, or other person, for any services performed, paper read, or address delivered except as has the prior approval of the House of Delegates or Board of Governors.*

D. REPRESENTATION OF NATIONAL CONFERENCE OF BAR EXAMINERS IN HOUSE OF DELEGATES BY DELEGATE RATHER THAN BY CHAIRMAN

(1) Amend the Constitution, Article VI, Section 3 by deleting line 15: "The Chairman of the National Conference of Bar Examiners", and by renumbering lines 15-41 as 14-40 respectively.

(2) Amend the Constitution, Article VI, Section 8 by inserting in line 3, following the words "Judicature Society", the words "*the National Conference of Bar Examiners*".

Mr. Poole explained that the present By-Laws do not permit any Section or Committee to make an award in recognition of outstanding work, and the proposal is intended to permit such recognition after clearance from the Board of Governors. Paragraph D was needed because the National Conference of Bar Examiners frequently meets at the same time as the House of Delegates, which prevents the Chairman from attending the meeting of the House, he explained.

The House voted to adopt the proposals without debate.

Paragraphs E and F were offered by C. Brewster Rhoads of Philadelphia, for the Committee. The proposals read as follows:

E. REGISTRATION AND REIMBURSEMENT FOR STATE DELEGATES

(1) Amend the Constitution, Article VI, Section 5, by deleting from line 33 the words "from the continental United States" so that the first part of the sentence beginning on line 33 shall read as follows:

If a State Delegate shall fail to register at any meeting of the House of Delegates by 5 o'clock P. M. on the opening day thereof the office of such State Delegate shall be deemed to be vacant during that particular meeting . . .

(2) Amend the Constitution, Article IX, Section 1, by deleting from lines 30 and 31 the words "in the Continental United States", and by substituting in line 32 for the words "in this section" the word "hereinabove" so that the first sentence of the paragraph beginning on line 30 shall read as follows:

The traveling and other necessary expenses incurred in attendance at the meeting provided for *hereinabove* shall be paid by the Association.

F. CHANGE OF NAME OF SECTION

(1) Amend the Constitution, Article X, Section 2 to read as follows:

Section 2. Establishment, Combination and Discontinuance. New Sections may be established and existing Sections may be combined, discontinued, *or their names changed* by the House of Delegates, after a report by the Board of Governors, in the manner provided by the By-Laws, and the foregoing list shall be changed in accordance with the action so taken.

(2) Amend the By-Laws, Article IX, Section 1, so that the first sentence will read as follows:

Section 1. Establishing or Combining Sections. New Sections may be established *and existing Sections combined or discontinued or their names changed* by the House of Delegates by two-thirds vote, after a report by the Board of Governors on the proposal therefor.

Paragraph E was required by the admission of Alaska and Hawaii to statehood, Mr. Rhoads explained, while Paragraph F was being done in order to have the Constitution and By-Laws consistent with the situation as it now exists with reference to Sections.

These proposals were adopted.

James D. Fellers, of Oklahoma City, presenting Paragraphs G and H, explained that G was needed to eliminate the possibility of undesirable use of expense accounts while H was merely intended to eliminate obsolete material from the Constitution. The paragraphs, which were adopted without debate, read as follows:

G. REIMBURSEMENT FOR MEETINGS HELD IN CONJUNCTION WITH ANNUAL MEETING

Amend the By-Laws, Article XIII, Section 4 by changing the period in line 8 to a semi-colon, and adding the words shown in italics, so that Section 4 reads as follows:

Section 4. No appropriation shall be made for traveling expenses

of any member of any Advisory Committee as such, nor shall any appropriation be made for the traveling or other expenses of any member of the Board of Governors or of the House of Delegates or of any Committee or Section Council or Committee that are necessary and appropriate to and arise out of attendance as such at the annual meeting of the Association; *nor shall any appropriation be made for traveling expenses for attendance at any meeting in the area where the annual meeting is held, during, or in the seven days preceding or following the period of such meeting; but a per diem may be provided for such attendance on any days preceding or following such annual meeting.* This Section shall not apply to any paid employee of the Association.

H. ELIMINATION OF OBSOLETE MATERIAL

(1) Amend the Constitution, Article VIII, Section 1 by eliminating lines 13 and 14: "In the year 1959, there shall be elected a President, who shall not thereafter be eligible for election to that office."

(2) Amend the Constitution, Article IX, Section 1 by eliminating from lines 17 and 18 the sentence "At such meeting held in the year 1959 the State Delegates shall make a nomination for the office of President" and by renumbering the following lines accordingly.

Amendment II was proposed by both the Committee on Rules and Calendar and the Committee on Scope and Correlation of Work; it was presented by Edward G. Knowles, of Denver, a member of the Committee on Scope and Correlation.

The proposal was to create a Standing Committee on Lawyers and Legal Services in the Defense Establishment in place of the Special Committee on Lawyers in the Armed Forces.

The proposal was as follows:

II

Notice is hereby given that Philip C. Ebeling, of Dayton, Ohio; James D. Fellers, of Oklahoma City, Oklahoma; William Poole, of Wilmington, Delaware; Lewis C. Ryan, of Syracuse, New York; and George H. Turner, of Lincoln, Nebraska, members of the Association and members of the Committee on Rules and Calendar; Bert H. Early, of Huntington, West Virginia; Harold H. Bredell, of Indianapolis, Indiana; Albert J. Harno, of Springfield, Illinois; Edward G. Knowles, of Denver, Colorado; and Karl C. Williams, of Rockford, Illinois, members of the Association and members of the Committee on Scope and Correlation of Work, herewith file with the Secretary of the American Bar Association the following proposed amendments to the By-Laws of the Association:

STANDING COMMITTEE ON LAWYERS AND LEGAL SERVICES IN THE DEFENSE ESTABLISHMENT

(1) Amend Article X, Section 6, by renumbering lines 18-32 inclusive to lines 19-33 respectively.

(2) Amend Article X, Section 6, by adding in proper alphabetical order, as a new line 18: "*Lawyers and Legal Services in the Defense Establishment.*"

(3) Amend Article X, Section 7, by redesignating paragraphs (p) through (dd), inclusive, as paragraphs (q) through (ee) respectively.

(4) Amend Article X, Section 7, by adding a new section (p) to read as follows:

(p) *Lawyers and Legal Services in the Defense Establishment.*

(1) This committee shall have jurisdiction to study and report to the House of Delegates from time to time with respect to all matters concerning the designation, privileges, duties and other phases of both military and civilian lawyers in the Defense Establishment and Legal Services that are or ought to be performed by military or civilian legal personnel, except as hereinafter limited.

(2) This committee shall not have jurisdiction of the policies and procedures encompassed within the scope of work of the Standing Committee on Legal Assistance to Servicemen except to collaborate with such committee on matters concerning personnel and facilities offering such legal assistance to servicemen and their dependents.

(3) This committee shall not have jurisdiction of the policies and procedures encompassed within the functioning scope of any Standing or Special Committee on Military Justice from time to time except to collaborate with any such committee on matters concerning personnel and facilities dispensing military justice or training personnel for such service.

Dean John Ritchie III, of Evanston, Illinois, representing the Judge Advocates Association, said that his organization believed that the jurisdiction of the proposed new Committee was too broad, since it would cover both military and civilian lawyers. "Obviously, the designations and privileges of civilian lawyers in the Establishment and military lawyers differ substantially", he said. "Typically, also, the duties of the civilian lawyer in the military establishment and the military lawyer differ significantly. . . . I submit that there is no more reason for a Standing Committee of the American Bar Association on civilian lawyers in the Defense Establishment than there is for a Standing Committee on Lawyers in the Department of Justice, let us say, or the Department of the Interior, the Securities and Exchange Commission, or any other federal department or agency." Dean Ritchie moved that the references to "civilian lawyers" be stricken from the amendment.

Franklin Riter, of Salt Lake City, rose to second Dean Ritchie's motion. The language of the proposal probably is the result of the promiscuous use by the Navy of civilians in administering military justice, he said, since for a time the Navy was using civilians on Boards of Review along with naval officers.

David F. Maxwell, of Philadelphia, a former President of the Association, was opposed to Dean Ritchie's motion. The purpose of the Committee was to improve the status of lawyers who were not covered by civil service, he said, and "it does not seem to me that it detracts one whit from that purpose by having those civilian lawyers in the Department of Defense coupled with the military lawyers". The proposal was in line with one of the recommendations of the Task Force of the Hoover Commission, he added.

F. Trowbridge vom Baur, of Washington, D. C., also spoke in opposition to Dean Ritchie's motion. There are serious problems that affect both civilian and military lawyers in the Defense Establishment, he said. "There are also problems of relationships between civilian and military lawyers and the problem of co-operation between the two, which is most important. In short, I view the subject matter of both military and civilian lawyers, and their

relationships, as primarily a single ball of wax."

Ashley Sellers, of the District of Columbia, said that he could see no reason why there should be any concern about having a committee broad enough to have jurisdiction over both military and civilian lawyers.

John P. Bracken, of Philadelphia, was also opposed to the motion. "I know through my experience [in the Reserve Officers Association] the difficulties between the uniformed personnel . . . and the non-uniformed personnel", he said. "I think if there is anything that this Committee can do . . . that would be helpful, it would be to provide these two fine groups, uniformed and non-uniformed, a forum wherein they could reconcile their differences and advance the lot of the lawyer, be he uniformed or non-uniformed, in the Armed Forces."

The House then voted down Dean Ritchie's motion and adopted the amendment in the form originally submitted by the Committees.

The third proposed amendment was presented by John C. Satterfield, the President-Elect of the Association, who sponsored the proposal along with the members of the Committee on Membership.

The amendment was as follows:

III

Notice is hereby given that S. David Peshkin, of Des Moines, Iowa, Louis A. Kohn, of Chicago, Illinois, and John H. Lashly, of St. Louis, Missouri, members of the American Bar Association and members of the Committee on Membership; and John C. Satterfield, of Yazoo City, Mississippi, member of the American Bar Association and President-Elect of the Association, herewith file with the Secretary of the American Bar Association the following proposed amendment to the By-Laws of the Association:

Amend the By-Laws, Article X, Section 7(r) *Membership*, by deleting in lines 1-12 thereof the following: "(1) This Committee shall consist of three members, each of whom shall serve until the adjournment of the third annual meeting following his appointment, and until his successor is appointed, provided that in the original appointment of this Committee the President shall designate one member to serve until the adjournment of the first annual meeting following his appointment, one to serve until the adjournment of the second annual meeting following his appointment, and one to serve until the adjournment of the third annual meeting following his appointment, but thereafter successors shall be appointed for three-year terms. The senior member shall act as Chairman of the Committee. (2)"

Article X, Section 7(r) will then read as follows:

(r) *Membership.* This Committee shall encourage desirable applications for membership in the Association, and shall formulate and recommend plans for maintaining and increasing membership. It shall have the responsibility of giving effect to such plans as are approved by the House of Delegates and Board of Governors.

Mr. Satterfield explained that most Association Standing Committees have seven members, but for some reason the Committee on Membership has been a three-man Committee. The proposal to change this was motivated by the fact that an intensive membership campaign is planned, which it is hoped will bring more of the 158,059 lawyers who are not members into the Association, he said, and a seven-man committee was felt to be more effective in such a campaign.

On his motion, the House voted to adopt the amendment.

The fourth amendment, sponsored by members of the Committee on Economics of Law Practice along with President Seymour and President-Elect Satterfield, was presented by Lewis F. Powell, Jr., of Richmond, the Chairman of the Committee. The purpose of the proposal was to change the Special Committee into a Standing Committee. Mr. Powell explained that there is little reason to believe that economic problems of the legal profession will become less acute in the immediate future, and making the Committee into a Standing Committee will enable it to deal with the problems in its jurisdiction on a long-term basis.

On his motion, the House voted to adopt the amendment with the provision the members of the Association staff would have authority to give appropriate numbers to the new paragraphs.

The next amendments to be considered were offered by the Special Committee To Consider Amendments to the Association's Constitution and By-Laws, headed by Charles W. Pettengill, of Greenwich, Connecticut.

He explained that the Committee was set up after the last Annual Meeting in Washington because of a proposal submitted there to treat the District of Columbia as a separate circuit for purposes of electing a member of the Board of Governors. The Committee had considered this, he said, but had concluded that it would be better to set up fourteen districts, each of which would elect a member of the Board. The Committee had also considered a number of other matters, some of which it was presenting at this meeting and some of which were being withdrawn for further study, Mr. Pettengill said.

Several of the proposals proved to be highly controversial. In order to facilitate consideration, Mr. Pettengill called attention to slightly revised versions of the original proposals which he offered out of their original numerical order. The revisions contained several typographical errors that later resulted in some confusion on the floor of the House.

Mr. Pettengill first offered Paragraph E of Amendment IV, changing it however so as to eliminate the "grandfather" clause referring to the Editor-in-Chief of the *Journal*, which was no longer necessary because of the death of Tappan Gregory, the Editor-in-Chief at the time the proposed amendment was drafted. The original proposal was as follows:

E. Board of Governors to be elected from 14 Districts

Amend Article VII, Section 1 of the Constitution so that it will read as follows:

Section 1. *How Constituted.* There shall be a Board of Governors of the Association. The Board shall consist of the President, the Chairman of the House of Delegates, the President-Elect, the Secretary *and* the Treasurer, all of whom shall be members ex officio, together with one member from each of *fourteen Districts as hereinafter described* who shall be elected as hereinafter provided, provided, however, that the Editor-in-Chief of

the American Bar Association Journal holding such office on January 1, 1961, shall be a member of the Board of Governors so long as he continues to hold the office of Editor-in-Chief, *and provided that the Immediate Past President, the President and the President-Elect of the Association in such positions on January 1, 1962 shall have an ex-officio term of one year on the Board of Governors immediately following their retirement as President of the Association.* If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term by a person chosen by the President of the Association and the members of the House of Delegates from the *District* in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning of the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect. In the absence of the President, the Chairman of the House of Delegates shall be the presiding officer of the Board of Governors.

William Poole, of Wilmington, Delaware, a member of the Rules and Calendar Committee, said that his Committee was opposed to eliminating the last retiring President of the Association from membership on the Board of Governors. ". . . the wisdom and knowledge of the bar association affairs . . . which the last retiring President has obtained during his trips around the country, his visits to the various states and bar associations, his conferences with bar officials, make him a most valuable member of the Board of Governors", Mr. Poole said. He moved to add the words "last retiring President" after the phrase "President-Elect" in the proposal and to eliminate reference to the last retiring President from the grandfather clause.

Mr. Powell, of Virginia, questioned the choice of the phrase "last retiring President". "It is possible a man could die and the last retiring President would be the one that was President about three years ago", he said. "Why isn't 'immediate Past President' used?"

Mr. Poole replied that his wording was the language of the present constitutional provision.

J. Garner Anthony, of Honolulu, objected that the Committee's proposal was unclear in its present form, and he asked for a copy of a redraft without the typographical errors. The Chair ruled this motion out of order.

Willoughby A. Colby, of Concord, New Hampshire, moved that the proposal be laid on the table to be taken up as a special order on the following day.

This motion was put to a vote but failed to carry.

Mr. Satterfield urged adoption of Mr. Poole's amendment. "From my experience on the Board, it seems to me it is very valuable to this Association for the man who has just served for twelve months working with the Committees and Sections, meeting with lawyers throughout the country, to remain and give the benefit of his experience to the Board of Governors", Mr. Satterfield said.

The matter was then put to a vote and Mr. Poole's motion was carried.

President Seymour then arose to argue against eliminating the Editor-in-Chief from membership on the Board. "The *Journal* is the agency through which the management of the Association communicates with the members and the members communicate with the management", Mr. Seymour argued. "The Editor-in-Chief is sensitive both to the point of view of the governing body and the point of view of the members. His participation in the deliberations of the Board is of the greatest importance." There were two arguments against having the Editor-in-Chief on the Board, Mr. Seymour continued: First, that adding four new members, as proposed by the Committee, would make the Board too large, so at least one member ought to be eliminated. "That seems to me a very narrow view of the function of the Board", Mr. Seymour said. "The Board is a very important deliberative body and every wise head that can participate in the deliberations ought to be kept available." Second, Mr. Seymour went on, it is argued that anyone who receives a salary ought never to be a member of the Board. "It seems to me that the fact that the Editor-in-Chief is a lawyer of sufficient experience and wisdom and seasoning to be able to give up part of his time and be paid in a modest way . . . is a qualification rather than a disqualification." He added that "Such an arrangement would have to be made with any busy lawyer who had to give up part of his time."

Mr. Seymour made the point that it was not enough merely to have the Editor-in-Chief present at meetings of the Board. "He ought to be a member . . . with a full voice in the deliberations and a full vote when the Board votes in order to give the Association the full benefit of what he knows and can contribute", he asserted. "I move that the Editor-in-Chief of the *Journal* be restored", Mr. Seymour concluded.

Carl B. Rix, of Milwaukee, a former President of the Association, said that he heartily endorsed Mr. Seymour's motion. "Many points on matters of policy never get beyond the Board of Governors", he declared, "and I believe . . . that it is a sine qua non [for] . . . the Editor-in-Chief to keep himself fully informed in every source of material affecting the policy of this Association."

Barnabas F. Sears, of Chicago, also urged the retention of the Editor-in-Chief on the Board. ". . . if there is any disposition on the part of this House to vote against this motion, then we ought to defer the matter at least until we determine whether or not we are going to have fourteen districts. . .", he said.

Mr. Colby, of New Hampshire, also agreed with Mr. Seymour's position. "I served on the Board of Governors for three years", he said, "and I know how valuable . . . the Editor-in-Chief is as a member of the Board."

Mr. Pettengill replied that his Committee had attempted to do what was best for the Association and, while it had had considerable difficulty in deciding what was best here, the fact that the Editor-in-Chief was not an elected member of the Board also had to be taken into consideration.

Karl C. Williams, of Rockford, Illinois, declared that the Editor-in-Chief should stay on the Board. "He is in a peculiarly advantageous position to know what is going on" among lawyers

throughout the country, he pointed out.

Cecil E. Burney, of Corpus Christi, Texas, a member of the Committee said that, after all, the Executive Director of the Association was not a member of the Board and he could not see why the Editor-in-Chief should be if the Executive Director were not.

In reply to a question by William A. Sutherland, of Atlanta, Mr. Seymour said that he would not accept as a substitute for his motion another motion that would remove the Editor-in-Chief from the Board with a grandfather clause that would apply to the present Editor-in-Chief. "That is a matter of principle and not a matter of individuals", Mr. Seymour asserted.

The matter was then put to a vote and Mr. Seymour's motion was carried.

A vote was then taken on Paragraph E as amended by the Seymour and Poole amendments and it was approved by the two-thirds vote needed to amend the Constitution. However, Mr. Sears inquired whether approval of the proposal carried with it a determination that members of the Board of Governors should be elected from fourteen districts instead of from ten Circuits.

The Chair ruled that it did, and Mr. Sears, as one who had voted in favor of the proposal, moved for a reconsideration of the amendment, and this motion was carried.

Mr. Anthony again voiced his demand for a new draft of the material. "What has gone on in the last half hour is ample demonstration of the need", he said. "I therefore move that the matter be deferred until tomorrow."

The Chair ruled that this motion was out of order, Mr. Anthony appealed from the ruling and the House voted to overrule the Chair.

Mr. Anthony then renewed his motion to defer action, but this motion was defeated, 73 to 108.

Harold Horvitz, of Boston, then moved that the vote on Paragraph E be deferred until after consideration of the proposal to create fourteen districts from which the Board of Governors would be selected.

Mr. Pettengill moved as a substitute to defer consideration of Paragraph E until the next morning session, and this motion was carried.

Mr. Pettengill then offered his next proposal, Paragraph F4, the effect of which was to eliminate the Director of Activities as a constitutional office. The proposal was as follows:

> 4. Present Section 4 of Article VIII shall become Section 5, and shall be amended to read as follows:
>
> Section 5. *Executive Director, Assistant Secretaries, Assistant Treasurers.* The Board of Governors may elect, and may prescribe the duties of, an Executive Director, one or more Assistant Secretaries and one or more Assistant Treasurers, each of whom shall hold office at the pleasure of the Board of Governors. The Executive Director shall be a member of the Association.

A voice vote was taken on this and the Chair declared that it had not carried by the necessary two-thirds vote (173 in this case). Mr. Riter, of Salt Lake City, called for a division and on a standing vote, 181 members of the House were in favor of the proposal, and accordingly it was declared carried.

Mr. Pettengill next offered Paragraph D, a proposal to amend the Constitution so as to provide for additional delegates to the House from each Section for each 10,000 members of the Section up to three Delegates.

Donald C. Beelar, of the District of Columbia, the Delegate of the Administrative Law Section, said that his Section was opposed to this. "We see no need for this amendment", he declared, "because when a Section matter comes before the House of Delegates, it is a unified proposal for action and you do not need multiple delegates to present one subject." Moreover, he went on, there should be some concern over increasing the size of the House, since at present it has only limited time. He was not opposed to giving the Junior Bar Conference additional delegates, Mr. Beelar added, because of its "special problem", but this could be done by giving them alone the additional membership, he suggested.

A vote was then taken, and 90 were in favor of the amendment and 65 against, and the amendment failed for lack of a two-thirds vote of the members of the House.

Mr. Pettengill said that the proposal was made because the Junior Bar Conference had written a strong letter requesting *ex officio* membership on the Board of Governors and this was thought to be preferable.

He then moved adoption of Paragraph F1 and F2; Paragraph F1 would have denied the Chairman of the House of Delegates eligibility for the office of President-Elect for two years after serving as Chairman of the House; Paragraph F2 provided that the Chairman should be the highest ranking officer of the Association after the President.

Ben R. Miller, of Baton Rouge, Louisiana, moved to separate the two paragraphs.

Edward W. Kuhn, of Memphis, moved to defer consideration of both. They are important, he said, and they should be deferred until there is a full membership in the House.

A speaker from the floor suggested that there was less than a quorum because the total on the last vote was less than 171.

Agreeing, Mr. Miller withdrew his motion. "I think the House needs a little rest and a little recess", he declared.

Raymond F. Barrett, of Quincy, Massachusetts, moved the reconsideration of Paragraph D, the proposal to give each Section an additional delegate for each 10,000 additional members.

Mr. Beelar joined this motion, saying that this would give the Committee time to draft a proposal to give only the Junior Bar Conference additional delegates.

The Chair ruled that this motion was out of order "as a matter of failure of the requisite constitutional majority while there was present a quorum of the House."

Harold J. Gallagher, of New York City, declared that "We will break faith with the Junior Bar Conference if we do not get this resolution passed." He supported the motion to defer consideration, he said, and he appealed from the ruling of the Chair.

A vote was taken, and the Chair was overruled.

A motion to recess was made from the floor and seconded.

Mr. Gallagher objected that a motion for reconsideration must be passed on the day on which the matter was first voted upon, and the Chair ruled that he was correct. The Chair put the question of reconsideration, and it was carried.

Mr. Kuhn renewed his motion to defer further consideration of the amendments until the next session, and this was carried.

The House then recessed at 4:45 P.M.

Second Session

The House reconvened at 9:30 A.M. on Tuesday, August 8.

Daniel M. Schuyler, of Chicago, the Delegate of the Section of Real Property, Probate and Trust Law, delivered the report for that Section, a special order of business for that time.

On Mr. Schuyler's motion, the House voted to approve a change in the Section's By-Laws which created the office of Second Vice Chairman.

Amendments to Constitution and By-Laws

The House then returned to its consideration of the proposed amendments to the Association's Constitution and By-Laws. Cecil E. Burney, of Corpus Christi, Texas, speaking for the Special Committee To Consider Amendment of the Association's Constitution and By-Laws, offered the following:

> Amend Article VI, Section 7 of the Constitution to read as follows: Section 7. Selection of Section Delegates. Each Section of the Association shall be entitled to one delegate in the House of Delegates, except the Junior Bar Conference, which shall be entitled to three delegates. At the Annual Meeting in each even-numbered year, each Section shall elect from its membership one delegate to the House of Delegates. At the Annual Meeting in each odd-numbered year, the Junior Bar Conference shall elect from its membership the two additional delegates to which it shall be entitled. Each delegate shall serve for a term of two years beginning with the adjournment of the Annual Meeting at which he is elected and ending with the adjournment of the Annual Meeting of the Association two years thereafter. In the event of a vacancy in the office of Section Delegate, the Council of the Section which he represents shall select and certify a successor for the unexpired term.

Mr. Burney explained that representatives of the Junior Bar Conference felt that the Conference was entitled to greater representation in the House or on the Board of Governors because it now has more than thirty thousand members. Representatives of the Conference had agreed in return, Mr. Burney said, to waive the "immemorial traditional politicking" that has gone on in the past to elect a Junior Bar Conference representative as Assembly Delegate at each Annual Meeting. Mr. Burney added that not a single Conference member had been nominated for Assembly Delegate at this meeting on the strength of the Committee's promise to sponsor the resolution.

On his motion, the House voted to approve the amendment.

The Committee's proposals numbered E, G2 and G3 were then offered for consideration by William B. Spann, Jr., of Atlanta. The proposals were as follows:

> Amend the Constitution, Article VI, Section 1, by striking from line 7 thereof following the word "each" the words "federal judicial circuit" and substituting therefor, after the word "each", the words "of fourteen Districts as hereinafter described," and by substituting in line 12 for the words "judicial circuit" the word "district". Article VII, Section 1, will then read as follows:
> Section 1. How Constituted. There shall be a Board of Governors of the Association. The Board shall consist of the President, the Chairman of the House of Delegates, the President-Elect, the last retiring President, the Secretary, the Treasurer, and the Editor-in-Chief of the American Bar Association Journal, all of whom shall be members ex-officio, together with one member from each *of 14 districts as hereinafter described*, who shall be elected as hereinafter provided. If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term, by a person chosen by the President of the Association and the members of the House of Delegates from the *District* in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning of the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect. In the absence of the President, the Chairman of the House of Delegates shall be the presiding officer of the Board of Governors.

Mr. Spann explained that there were substantial inequities in the present method of choosing members of the Board of Governors by judicial circuit. For example, the Ninth Circuit has nine states and, under the custom of rotating the election of members of the Board among the states in the Circuit, twenty-seven years elapse in that Circuit between each state's turn to have a member on the Board. "We felt that we . . . could give a little proportional representation on the Board, depending upon the lawyer population, and we could also group states with a little more common interest rather than the artificial grouping of judicial circuits", Mr. Spann said. In view of the action yesterday by the House, the proposals to remove from the Board the last retiring President and the Editor-in-Chief of the *Journal* had been dropped, Mr. Spann added.

Proposal G2, he said, was merely a re-enactment of the language of the present Constitution with the word "District" substituted for "Judicial Circuit".

The House voted to approve the proposed amendments.

At this point, the House broke off consideration of the Constitutional and By-Laws amendments in deference to President Seymour who wanted to speak on the next proposal but was unable to be present at that time.

Philip C. Ebeling, Chairman of the Committee on Rules and Calendar, moved adoption of the following change in the Rules of the House. He explained that House committees are supposed to serve for one year, but the present rule inadvertently provides that they serve "until the next meeting". Since the House has two meetings a year, the committees technically expire at the adjournment of the Midyear Meeting, Mr. Ebeling said.

The amendment was adopted without debate as follows:

Amend Rule X, paragraph 3 of the Rules of Procedure of the House of Delegates by inserting the word "annual" in line 3, between the word "next" and the word "meeting"; and inserting the words "the members of" before the words "each committee" in line 1; so that paragraph 3 will read as follows:

3. Except where otherwise provided by the House, *the members of* each committee of the House shall serve until the adjournment of the next *annual* meeting of the House after their appointment, and thereafter until their successors have been appointed.

Loyd Wright, of California, a former President of the Association, spoke briefly about the forthcoming meeting of the International Bar Association to be held in Edinburgh next July. He urged support for that organization. Former President David F. Maxwell, of Philadelphia, joined Mr. Wright, calling attention to an arrangement that has been made to charter a private plane to carry American lawyers to the Edinburgh meeting.

Mr. Burney introduced Merritt H. Deakens, the General Counsel of the Navy, who received the greetings of the House.

Edward W. Kuhn, of Memphis, reporting for the Committee on Retirement Benefits, said that H.R. 10, which is legislation to permit self-employed persons to participate in tax-deferred private pension plans, is now in Committee in the Senate, and that he believed that the Committee was favorably disposed toward the bill. On his motion, the House voted to continue the Committee.

Daniel S. Wentworth, of Chicago, a member of the Committee on Federal Liens, made a progress report on Association-sponsored measures pending in Congress. On his motion, the following was adopted:

Resolved, That the Committee on Federal Liens be continued as a Special Committee of the Association, and that it be directed to continue to urge the amendments set out in the Final Report of the Committee on Federal Liens approved by the House of Delegates, at its 1959 Midyear Meeting, or their equivalent in purpose and effect, on the proper committee or committees of Congress.

Lawyers in the Armed Forces

John P. Bracken, of Philadelphia, the Chairman of the Committee on Lawyers in the Armed Forces, reporting for that Committee, said that his Committee had again registered protest against using Defense Department funds to give a legal education to career officers. He also reported that there was little chance this year for passage of legislation to create a Judge Advocate General's Corps in the Navy. On his motion, the Committee was continued in the event it was not made into a Standing Committee under a pending amendment of the By-Laws.

Committee on Professional Relations

Erwin N. Griswold, of Cambridge, Massachusetts, Chairman of the Committee on Professional Relations, made a brief report for that Committee. He called attention to the publication by the Committee on Professional Ethics of its opinion on "joint practice" by persons who are both lawyers and accountants, and went on to discuss a case in Kentucky where a suit is pending to hold an accountant in contempt because he practiced law. Dean Griswold said that a major effort of his Committee at present was directed toward encouraging the adoption by lawyers and accountants in the several states of the statement of principles between lawyers and certified public accountants, which some years ago had been approved by the House of Delegates. On his motion, the Committee was continued.

Membership Committee

David S. Peshkin, of Des Moines, Chairman of the Membership Committee, reported that the Association now has over 102,000 members. He announced that a drive would soon begin to obtain another 25,000 and predicted that the Association would have 200,000 members by 1970.

Constitution, By-Laws Amendments

Roy E. Willy, of Sioux Falls, South Dakota, a member of the Special Committee To Consider Amendments to the Association's Constitution and By-Laws, then continued the report of that Committee. He offered the following amendment to the Constitution, which in the Committee's original designation was Proposal F-1:

Amend Article VIII, Section 2 of the Constitution to read as follows: Section 2. Chairman of the House of Delegates. A Chairman of the House of Delegates, chosen from the membership of the House of Delegates, shall be elected by the House of Delegates at the Annual Meeting in even-numbered years by a majority vote of those present and voting, and shall serve for the term of two years beginning with the adjournment of the Annual Meeting at which he is elected and ending with the adjournment of the second following Annual Meeting of the House of Delegates. *During his term of office he shall not hold or seek any other office in the Association and* shall not thereafter be eligible to re-election *as Chairman of the House. He likewise shall not for two years after his term of Chairman expires be eligible for election as President-Elect of the Association.*

Mr. Willy said that there had been a few instances when the Chairman of the House had actively campaigned for the office of President during his term as Chairman, and this was felt to detract from the dignity of the office of Chairman. "There have been many Chairmen who have passed from the office to President of the Association", Mr. Willy said. "There undoubtedly will be many more. They served with distinction, and the fact that they have to wait two years after the conclusion of their term before they can seek that office imposes no great hardship on them. . . ."

The amendment was approved without further debate.

Mr. Willy then proposed Item F-2, as follows:

Section 3. Duties of the Chairman of the House of Delegates. The Chairman of the House of Delegates shall, during his term of office, be the second ranking officer of the Association, next to the President. He shall, in the absence of the President, preside at all meetings of the Board of Governors and shall also, in the absence or disability of the President, preside at Assembly Meetings of the Associ-

> ation, its Regional Meetings, and at such other times and occasions as would the President were he present.

Mr. Willy explained that it was never intended that the President-Elect should be a "Vice President". That office was created to give the next President a year to plan and make committee appointments. The purpose of the amendment was to avoid any possibility of conflict between the President-Elect and the Chairman of the House, Mr. Willy went on, and also to straighten out an inconsistency in the present provisions. The Constitution now provides that the Chairman of the House shall preside over the Board of Governors in the absence of the President, but a few years ago another section was added which provides that the President-Elect shall preside.

President Seymour spoke against the provision naming the Chairman of the House as the second-ranking officer in the Association. Mr. Seymour—who was himself the first President-Elect of the Association—said that the President-Elect must spend at least half his year in that office pinch-hitting for the President and talking to the people who are going to be his committee chairmen. When a state bar association asks the President of the American Bar Association to speak and he has a conflicting schedule, Mr. Seymour said, the state association will accept the President-Elect when it would not accept the Chairman of the House. The effect of the proposal, he went on, "will be to create confusion and possible conflict and be right in the teeth of the natural inference of people that the President-Elect is the second officer; and I do not see any reason at all in trying to legislate contrary to nature. . . ." The Chairman of the House is an important job, Mr. Seymour concluded, and the office does not need any "artificial legislation" to make it important.

Mr. Stecher pointed out that the proposal, if adopted, "will create an unconsistency between the Constitution and By-Laws because Article VIII, Section 1, of the By-Laws provides that in the absence or disability of the President, the President-Elect shall perform the duties of his office".

Ben R. Miller, of Louisiana, moved that the words "during his term of office, be the second ranking officer of the Association, next to the President" be stricken from the amendment and the words "President-Elect" be inserted after the word "President" and before the word "preside" in the next sentence.

E. Smythe Gambrell, of Atlanta, a former Association President, declared that he was in favor of Mr. Miller's motion.

Albert E. Jenner, Jr., of Chicago, speaking against Mr. Miller's motion, said that he thought that the Chairman of the House ought to be an independent officer and that it was preferable to have him preside in the absence of the President.

Sylvester C. Smith, Jr., of Newark, New Jersey, the new President-Elect and a former Chairman of the House, was in favor of the Committee's proposal and opposed Mr. Miller's amendment. By precedent, the Chairman of the House presides in the absence of the President, Mr. Smith said, and the Chairman has some eleven duties assigned to him under the Constitution, whereas the President-Elect has only one—to perform the duties assigned him by the President. The President-Elect ought to have the year of his term free to make his plans and assist the President, Mr. Smith asserted.

James L. Shepherd, Jr., of Houston, another former Chairman of the House, was also opposed to Mr. Miller's amendment. The House is the governing body of the Association, he pointed out, and the Board of Governors is a committee of the House. It is logical that the Chairman of the House should preside in the absence of the President. Mr. Shepherd indicated, however, that he was opposed to making the Chairman the second ranking officer of the Association.

Mr. Wright, of California, compared the office of Chairman of the House to that of Vice President of the United States, likening the President of the Association to the Executive Branch of the Federal Government. Mr. Wright pleaded for "spreading the honors around". On that basis alone it would be sufficient to have him support the proposal of the Committee, he said.

On Mr. Jenner's motion, the House then agreed to sever the proposal to eliminate the language of the amendment making the Chairman of the House the second-ranking officer of the Association and the proposal to make the President-Elect the presiding officer in the absence of the President.

Mr. Jenner, speaking on the first of the two proposals, supported the view that the Chairman of the House should not be the second-ranking officer. It was inconsistent, he said, because in reality the Board is an executive body whereas the House is a legislative body.

Robert G. Storey, of Dallas, a former President of the Association, declared that the House is the legislative body, not only of the Association, but also of the legal profession of the whole country and he supported the deletion of the language because it would be downgrading the Chairman to name him as the "second" officer of the Association.

A vote was then taken and the motion carried to delete from the amendment the language making the Chairman the second-ranking officer of the Association.

In the light of the discussion on the floor, Mr. Miller then changed the second portion of his motion so as to provide that the Chairman of the House should preside at meetings of the Board in the absence of the President and President-Elect.

Mr. Jenner proposed that the words "As would the President were he present" be added at the end of the proposal, and Mr. Miller accepted this suggestion.

The House then voted to approve the amendment. In its final form, it reads as follows:

> Section 3. Duties of the Chairman of the House of Delegates. The Chairman of the House of Delegates shall in the absence of the President, preside at all meetings of the board of Governors and shall also, in the absence or disability of the President, and President-Elect, preside at Assembly Meetings of the Association, its Regional Meetings, and at such other times and occasions as would the President were he present.

On Mr. Pettengill's motion, the House then approved the following:

3. Present Section 3 of Article VIII shall become Section 4. *Vacancies.* Eliminate present Section 3 of Article IX and insert in lieu thereof the following:

Section 3. *Choice of Board of Governors by Districts.* A member of the Board of Governors shall be chosen by each *of fourteen districts as follows:*

District 1: Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
District 2: Connecticut, New York, Vermont
District 3: Delaware, New Jersey, Pennsylvania
District 4: District of Columbia, Maryland, Virginia
District 5: Florida, Georgia, North Carolina, South Carolina
District 6: Alabama, Louisiana, Mississippi, Tennessee
District 7: Michigan, Ohio, West Virginia
District 8: Illinois, Indiana, Kentucky
District 9: Iowa, Missouri, Wisconsin
District 10: Kansas, Minnesota, Nebraska, North Dakota, South Dakota
District 11: Arkansas, Oklahoma, Texas
District 12: Arizona, Colorado, New Mexico, Utah, Wyoming
District 13: Alaska, Idaho, Montana, Oregon, Washington
District 14: California, Hawaii, Nevada

At the time of his nomination he shall be a resident of the *District* for which he is chosen, and shall be, or shall have been, a member of the House of Delegates. He shall be elected for a term beginning with the adjournment of the annual meeting at which he is elected and ending with the adjournment of the third annual meeting next following his election. *In 1962 and each third year thereafter,* a member of the Board of Governors shall be elected *from each the seventh, eighth, tenth, eleventh and thirteenth Districts; in 1963 and each third year thereafter, from the first, second, fourth, sixth and twelfth Districts; and in 1964 and each third year thereafter, from the third, fifth, ninth and fourteenth Districts. In the year 1962, the fourth District shall elect a member of the Board of Governors for an interim term of one year, and the ninth District shall elect a member of the Board of Governors for an interim term of two years.* All elections upon nominations made as hereinbefore provided shall be by the House of Delegates on the first day of its annual meeting.

Provided that the members of the Board of Governors elected prior to 1962 shall continue to serve for the full terms for which they were elected, but shall be regarded at the Annual Meeting in 1962 as representing the District from which they come.

Eliminate present Section 4 of Article IX and insert in lieu thereof the following:

Section 4. *Optional Method of Nominating and Electing Member of Board of Governors from a District.* If at any time the State Bar Associations of a majority of the States in a *District* decide that the member of the Board of Governors from that *District* shall be elected by mail ballot and in writing notify the Board of Elections of that decision, the member of the Board of Governors from such *District* shall thereafter be nominated by the State Delegates from *District,* within the times prescribed for the nominations of State Delegates; and like opportunity shall be given for the making and filing of other nominations. Thereafter the Board of Elections shall send to all members of this Association in such *District* a printed ballot for the election of such member of the Board of Governors; and the election in and for such *District* shall be conducted in the same manner prescribed for the election of State Delegates by mail ballot. This optional method of nominating and electing a member of the Board of Governors from a *District* may be discontinued at any time by a majority vote of the State Bar Associations in such *District.*

Mr. Pettengill announced that the Committee was deferring action on its proposals to elect Assembly Delegates by zones, to have retiring members of the Board of Governors serve as *ex officio* members of the House of Delegates for two years after their service on the Board and to have the State Delegates nominate two slates of candidates for officers and members of the Board at each Midyear Meeting.

Mr. Pettengill then offered a resolution authorizing the Chairman of the House to appoint a Special Committee to work with the Committee on Rules and Calendar to give further consideration of the amendments that had not been acted upon.

On motion of Mr. Jenner, this resolution was amended to continue the present Committee with the present membership, and in this form the resolution was adopted.

Mr. Storey called attention to the presence in the room of Hatton W. Sumners, of Texas, a long-time former member of the House and a long-time Chairman of the Judiciary Committee of the United States House of Representatives. Mr. Sumners received the greetings of the members of the House.

Continuing Education of the Bar

Churchill Rodgers, of New York City, Chairman of the Committee on Continuing Education of the Bar, delivered an oral report which called attention to the Committee's plans to produce a pilot film on the use of revocable *inter vivos* trusts in estate planning. Mr. Rodgers said that it is hoped that this will be the first of a series of films.

Continuing Legal Education

On motion of Secretary Calhoun, the House voted to approve the May action of the Board of Governors making changes in the memorandum of understanding between the American Bar Association and the American Law Institute on the subject of continuing education of lawyers. The change involved making either the President of the Law Institute or the Chairman of its Council the Chairman of the Joint Committee on Continuing Legal Education instead of the President as before.

Harrison Tweed, of New York City, the Chairman of the Joint Committee, delivered an oral report which called attention to the publication, *The Practical Lawyer,* and stressed the importance of lawyers' learning to recognize problems of conflict of interests.

Lawyers' Retirement Plan

On motion of John R. Nicholson, of Chicago, Chairman of the Committee on Lawyers' Retirement Plan, the House voted to continue that Committee.

American Citizenship

Jerome S. Weiss, of Chicago, Chairman of the Committee on American Citizenship, reported orally, mentioning in particular the Committee's new booklet on "Sources of Our Liberties", a compilation of basic historical documents.

The House recessed at 12:05 P.M.

Third Session

The House reconvened at 2:00 P.M. on Tuesday, August 8.

Clients' Security Fund Committee

Theodore Voorhees, of Philadelphia, the Chairman of the Committee on Clients' Security Fund, predicted that Clients' Security Funds will shortly be established "throughout this country from coast to coast". There are now funds in fifteen states, he said, and plans for creating others are underway in several states. In addition, a number of large city bar associations are considering such funds, and one, Baltimore, has already acted.

Section of Legal Education

Willoughby A. Colby, of Concord, New Hampshire, on behalf of the Section of Legal Education and Admissions to the Bar, moved the adoption of the following:

> That the House of Delegates approve the recommendation of the Section that the University of Akron School of Law of Akron, Ohio, be granted provisional approval by the American Bar Association, subject to annual inspections at the expense of the school until full approval be given.

The resolution was passed without debate.

Committee on Regional Meetings

The report of the Committee on Regional Meetings was given by Edward W. Kuhn, of Memphis, Tennessee. Mr. Kuhn announced that regional meetings will be held in Birmingham, Alabama, in November, in Salt Lake City, Utah, in May, 1962, and in Little Rock, Arkansas, in November, 1962.

On motion of Secretary Calhoun, the House voted to continue the Committee on Clients' Security Fund in accordance with a recommendation of the Board of Governors which had been overlooked when the report of that Committee was given. The House also voted to continue the Committee on Administrative Agency Appointments, the Committee on Atomic Attack and the Committee on Atomic Energy Law.

Committee on Customs Law

Mollie Strum, of New York City, delivered a brief oral report for the Committee on Customs Law.

World Peace Through Law

On motion of Charles S. Rhyne, of Washington, D.C., a former President of the Association and Chairman of the Committee on World Peace Through Law, the House voted to continue that Committee. Mr. Rhyne delivered an oral report on the San Jose Conference of Lawyers held last June and discussed plans for meetings on other continents in the future. He said that New Delhi, India, is the place most discussed as the site of the World Conference of Lawyers which will climax the series of continental meetings.

Uniform Rules in Federal Courts

On motion of Charles W. Joiner, of Ann Arbor, Michigan, the House voted to continue the Committee on Uniform Evidence Rules for Federal Courts.

Support of H.R. 10

On motion of President Seymour, the House then voted to adopt the following:

> *Whereas*, The American Bar Association has long sought the enactment of legislation to correct the discrimination against self-employed individuals in the tax treatment of retirement savings, and
>
> *Whereas*, H.R. 10 would help correct this inequity by permitting self-employed individuals to participate in tax deferred private pension plans, and
>
> *Whereas*, This important legislation is now being considered by the Committee on Finance of the United States Senate; it is hereby
>
> *Resolved*, That the American Bar Association reiterates its support for H.R. 10, and urges the United States Senate to act favorably on this legislation without further delay, and it is further
>
> *Resolved*, That a copy of this Resolution be sent to each member of the Finance Committee of the United States Senate.

Communist Tactics and Strategy

Henry J. TePaske, of Orange City, Iowa, the Chairman of the Committee on Communist Tactics, Strategy and Objectives, reporting for that Committee, declared that "We face one of the most perilous periods in our history" as a result of the communist sabre-rattling. He called attention to the Committee's pamphlet "Peaceful Co-Existence: Blueprint for Destruction" which he urged the members of the House to read. On his motion, the House voted to continue the Committee. A motion by Gibson B. Witherspoon to increase the size of the Committee to ten members was ruled out of order because it had not been considered by the Committee on Rules and Calendar.

Contrast Between Liberty and Communism

On motion of E. Dixie Beggs, of Pensacola, Florida, the House voted to continue the Committee on Education in the Contrast Between Liberty Under Law and Communism. Mr. Beggs made an oral report which noted, among other points, that both Louisiana and Florida have adopted legislation requiring public schools to have programs of instruction about the dangers of communism and that such a course has been adopted in Dallas under the leadership of the local Bar. Mr. Beggs declared that the "shocking thing" was that a survey of 278 replies from state and local bar associations showed

that 197 of them had no program of education about communism and the survey showed that none was in existence in those areas. Mr. Beggs said that our educational system must not only teach our students American ideals and American principles, it must go further and contrast the ideology of communism with our own ideals. He warned that we must be on guard "against the infiltration or perversion of such a program". Much of the Committee's work has been to collect a summary of activities and materials that will help local agencies in establishing educational programs, Mr. Beggs went on, and he urged members of the House to pass on to state and local associations and to educators the bibliography on communism attached to the Committee's report.

On motion of Edward G. Knowles, of Denver, Harold H. Bredell, of Indianapolis, was elected to membership on the Committee on Scope and Correlation of Work.

George S. Geffs, of Janesville, Wisconsin, Chairman of the Special Committee on Individual Rights as Affected by National Security, moved that that Committee be continued, and the motion was carried without debate.

Junior Bar Conference

William Reece Smith, Jr., of Tampa, Chairman of the Junior Bar Conference, reported briefly for that Section.

The report of the Committee on Aeronautical Law was received and filed.

Constitutional Amendment To Limit Taxes

Francis W. Hill, of Washington, D.C., Chairman of the Committee on Proposed Amendment to the Constitution of the United States Relative To Taxes on Incomes, Inheritances and Gifts, reported that his Committee was of the opinion that it is not possible to secure constitutional amendment to limit taxes on incomes, inheritances and gifts. He said that they favored changing the name of the Committee to "Committee on Preservation of Our Form of Government as Affected by Taxation"; however, since the Board of Governors was not in favor of the new name, he moved that the Committee be continued, with power given to the Board to change the name of the Committee.

Secretary Calhoun noted that the Committee also wanted to enlarge the Committee to eleven members. Since increasing the size of a Committee involves budgetary considerations, it requires prior submission to the Board of Governors. Mr. Calhoun moved that Committee be continued but that the rest of its recommendations be referred to the Board. The House voted to adopt this substitute motion.

Committee on Professional Ethics

James L. Shepherd, Jr., of Houston, Chairman of the Committee on Professional Ethics, called attention to the new policy of publishing résumés of the Committee's informal opinions in the *Journal*. The publication was intended to guide and assist state and local ethics committees, Mr. Shepherd said.

Committee on Gavel Awards

Richard P. Tinkham, of Hammond, Indiana, Chairman of the Committee on Gavel Awards, delivered an oral report beginning with a motion to continue the Committee, which was carried. He announced that the seven gavel awards, given to the press, radio and television for outstanding contributions to public understanding of the American legal and judicial system, had been awarded this year to the *Christian Science Monitor*, the Armstrong Circle Theatre, the University of Michigan Television Center, *The Chicago Tribune*, the *Hartford Times*, CBS Reports, and Station KMOX, St. Louis. The awards were made from a total of thirty-eight nominees.

Public Relations Committee

Speaking for the Public Relations Committee, of which he is also the Chairman, Mr. Tinkham, recalled the death of John Stone, the Association's liaison with the television and motion picture industry. Mr. Tinkham praised Mr. Stone's work, saying that before he became liaison representative of the Association, the Committee received complaints from all over the country about the "shabby portrayal" of lawyers in motion pictures and on TV; since the employment of Mr. Stone the complaints have practically disappeared, Mr. Tinkham said. He added that Mr. Stone's successor is William Gordon, who has had a great deal of experience with the motion picture companies.

Federal Rules of Procedure

On motion of Joseph D. Stecher, of Chicago, the House voted to continue the Committee on Federal Rules of Procedure.

Loyd Wright, of Los Angeles, a former President of the Association, recalled that at the 1958 Annual Meeting in Los Angeles, the House had gone on record as favoring a modified "Missouri plan" for the selection of federal judges. He declared that both parties were still playing "gutter politics" in the appointment of federal judges, and moved for a reaffirmation of the House's 1958 stand. The Chair ruled that the motion was out of order.

Economics of Law Practice

Lewis F. Powell, Jr., of Richmond, Virginia, Chairman of the Committee on Economics of Law Practice, presented this for action by the House:

> *Resolved*, that a Special Committee on Personal Injury Claims be created (i) to investigate and study proposals made to substitute an administrative system for the present judicial system in personal injury claims, (ii) to consider the adequacy and effectivenesss of the present judicial system as compared with an administrative system for the disposition of such claims, and (iii) to follow and report to the Board of Governors and this House on any legislation pertaining to this subject which may be proposed.
>
> *Further Resolved*, that the Special Committee on Personal Injury Claims be comprised of seven members to be appointed by the President of the Association.

Mr. Powell recalled that in 1958 the

House had gone on record in opposition to any state legislation that would substitute an administrative remedy for trial by jury in personal injury cases. Since then, there have been many developments on the subject, he continued, and these developments are the reason for the Committee's resolution. On his motion, the House voted to adopt the resolution.

The House also voted to continue the Special Committee in the event that the Assembly failed to ratify the proposed amendment to the Association's By-Laws making it a Standing Committee.

Legal Aid Work

John W. Cummiskey, of Grand Rapids, Michigan, Chairman of the Committee on Legal Aid, made a short oral report that took the form of a review of the history of the development of legal aid and defender services in the past thirty years.

Section of Taxation

William R. Spofford, of Philadelphia, the Chairman of the Section of Taxation, said that his Section had a number of proposals for changes in the internal revenue laws, but that these would not be offered until the Midyear Meeting of the House next February. He did offer the following:

Resolved, That the American Bar Association recommends to the Congress that it enact legislation to improve the Internal Revenue tax administration by providing for the use of numbers to indentify taxpayers on returns filed by taxpayers and on information returns showing payments of income to taxpayers; and

Be It Further Resolved, That the Association proposes that this result be effected by amending the Internal Revenue Code of 1954 by adding thereto a new section; and

Be It Further Resolved, That the Section of Taxation is directed to urge the following amendment, or its equivalent in purpose and effect, upon the proper committees of Congress:

Sec. 1. Part I of Subchapter A of Chapter 61 of the Internal Revenue Code of 1954 (relating to records, statements, and special returns) is amended by adding at the end thereof the following new section:

SEC. 6002. SUPPLYING OF IDENTIFYING NUMBERS

In addition to the requirements set forth in Parts II and III of this subchapter, when required by regulations prescribed by the Secretary or his delegate—

(1) Any person required by this title or by regulations made under authority thereof to make a return, statement, or other document shall include in such return, statement, or other document such identifying number as may be prescribed for securing proper identification of such person.

(2) Any person with respect to whom a return or statement of information is required by this title or by regulations made under authority thereof to be made by another person shall furnish to such other person such identifying number as may be prescribed for securing his proper identification.

(3) Any person required by this title or by regulations made under authority thereof to make a return or statement of information with respect to another person shall include therein such identifying number, received from such other person, as may be prescribed for securing proper identification of such other person, unless reasonable cause is shown for failure to so include such identifying number.

Sec. 2. The title of Part I of Subchapter A of Chapter 61 of the Internal Revenue Code of 1954 is amended to read as follows:

PART I—RECORDS, STATEMENTS, SPECIAL RETURNS, AND IDENTIFYING NUMBERS

Sec. 3. The table of sections for Part I of Subchapter A of Chapter 61 of the Internal Revenue Code of 1954 is amended by adding at the end thereof the following:

Sec. 6002. Supplying of identifying numbers.

Mr. Spofford explained that, while the proposal to give each taxpayer an indentifying number might smack of regimentation at first consideration, it is absolutely essential if any system of automatic data processing is to be used in processing tax returns. Moreover, almost 90 per cent of the taxpayers now have identifying numbers, he pointed out, since almost every taxpayer is subject to the Social Security Act. It is expected that the proposal would eliminate some of the underreporting of income that is estimated to run to nearly $20,000,000,000 annually.

The House voted to adopt the resolution and to approve the report.

Legal Services and Procedures

On motion of Secretary Calhoun, the House voted to continue the Special Committee on Legal Services and Procedure and to abolish the *ad hoc* Committee on a Permanent Congressional Committee on Administrative Procedure.

Unauthorized Practice of the Law

F. Trowbridge vom Baur, Chairman of the Committee on Unauthorized Practice of the Law, delivered an oral report which summarized developments in that field. He discussed the recent Wisconsin case of *Wisconsin* v. *Dinker*, decided in June, in some detail, in which the Wisconsin Supreme Court upheld the validity of a rule promulgated by the state real estate board permitting real estate brokers to prepare legal instruments.

Mr. vom Baur offered the following for adoption:

Resolved, that the Statement of Principles entered into with the American Institute of Architects on April 23, 1961, by the Standing Committee on Unauthorized Practice of the Law acting for this Association be, and it hereby is, in all respects ratified, approved and confirmed.

The House then recessed at 4:25 P.M.

Fourth Session

The House began its fourth session at 9:30 A.M. on Wednesday, August 9.

Arthur VD. Chamberlain, of Rochester, New York, offered the following which was adopted without debate:

Whereas The American Bar Association was one of the chief sponsors of the Commission on Judicial and Congressional Salaries which in 1954 recommended increases in the compensation of members of the Federal Judiciary and the Congress, and

Whereas At the 1954 Annual Meeting this Association approved prior action of its Board of Governors urging adoption of the Commission's recommendations, and

Whereas Congress in 1955 increased Congressional and judicial salaries, but not to the extent recommended by the Commission, and

Whereas Since that time three salary increases have been granted to Federal employees, one in 1955, a 7½ per cent increase, one in 1958, a ten per cent increase, and one in 1960, a nine per cent increase, but these increases were not applied to Congressional and judicial salaries.

Now Therefore Be it Resolved That this Association reaffirms its aforesaid approval and urges the Congress to increase the judicial and Congressional salaries to the level recommended by the said Federal Commission on Judicial and Congressional Salaries.

Committee on the Federal Judiciary

The report of the Committee on the Federal Judiciary was given by Bernard G. Segal, of Philadelphia, the Chairman. Mr. Segal said that passage of the omnibus judgeship bill had created seventy-three vacancies on the Federal Bench, which means that President Kennedy will be called upon to appoint at least 120 new judges during his term—more than one third of the total number on the Bench when he assumed office. This is more judges than any other President has been called upon to appoint, Mr. Segal said. He also reported that the new Administration has continued the program of co-operation with the Committee in screening candidates for the Federal Bench. "During the past six months, the Attorney General has requested our Committee to investigate and render informal reports on the qualifications of 246 persons and formal reports on 49", Mr. Segal reported. He described the liaison between the Committee and the Justice Department as "excellent" and declared that criticism of the Administration for not moving more rapidly in appointing new judges was not justified. The process of weeding out the large number of candidates takes at least three to four months, Mr. Segal said, and this is necessary to avoid making poor appointments. Mr. Segal said that of the seventeen original nominations President Kennedy has so far sent to the Senate, twelve were reported by the Committee as well qualified or exceptionally well qualified and five were reported as qualified and not a single nomination was made of a candidate regarded by the Committee as not qualified. Mr. Segal concluded by expressing the hope that the Administration would adopt a policy of appointing judges without regard to party—a policy the Association has been advocating for many years.

Mr. Segal then presented Archibald Cox, the Solicitor General, who addressed the House briefly.

Nonpartisan Selection of the Judiciary

Harold J. Gallagher, of New York City, a former Association President and Chairman of the Committee on Nonpartisan Selection of the Judiciary, reported that at the present time the Federal Bench is about evenly divided between the two major parties. He expressed doubt that it would be possible to obtain an impartial commission to recommend judicial appointments as proposed by the resolution creating his Committee in 1958, but he declared that the Committee would continue its work for that goal. On his motion, the House voted to continue the Committee.

Ben R. Miller, of Baton Rouge, Louisiana, as a matter of personal privilege, called attention to reports in the press which implied that the Association had endorsed the report of the Committee on Bill of Rights. The report contained some matters that were offensive to his constituents, he said, and decried the failure of the press to heed the admonition printed on every Committee report to the effect that the views expressed are merely those of the individual members unless they have been adopted by the House of Delegates.

Current Needs in Legal Education

Bethuel M. Webster, of New York City, Chairman of the Committee To Study Current Needs in the Field of Legal Education, reporting for that Committee offered the following three paragraphs of resolutions:

Resolved, That the American Bar Association assume primary responsibility for the leadership required to meet the need for informed pre-legal advisers, and to this end authorize and direct the Board of Governors, upon consultation with other interested organizations of lawyers and educators, to use the staff of the American Bar Association and other appropriate agencies to make available to high school and college students authentic, up-to-date information and advice concerning the practice of law and opportunities in the profession;

Further resolved, That the American Bar Association support the Joint Committee on Pre-Legal Education, composed of representatives of the American Bar Association, the Conference of Academic Deans, the Association of American Colleges, and the Association of American Law Schools, as the most suitable medium for recommending a detailed plan of improved pre-legal counseling;

Further resolved, That the American Bar Association request the American Bar Foundation to conduct a pilot survey of college and law students and graduates to determine the desirability of a comprehensive survey to explore in depth the reasons behind career decisions and the effect of such decisions on the future supply of lawyers.

Mr. Webster explained that his Committee was convinced that there was a shortage of qualified lawyers, and part of the reason for this was felt to be because many vocational counselors in high schools and colleges are ignorant of the legal profession and the nature of law.

The House voted to adopt the first three paragraphs of the resolutions, but at the suggestion of the Board of Governors, accepted by the Committee, it adopted the following substitute for the fourth paragraph:

Further resolved, that the American Bar Association recognizes the need for financial assistance in the field of legal education, both for law schools and law students, and the responsibility of the legal profession in connection therewith; and that the President of the Association appoint a committee consisting of not more than nine members representing the Board of Governors of the American Bar Association, the American Bar Foundation, and the Council of the Section of Legal Education, to study and report to the Board of Governors on ways and means of meeting this need.

Relations With Lawyers of Other Nations

Judge Stephen S. Chandler, of Oklahoma City, Chairman of the Committee on Relations with Lawyers of Other Nations, reported orally for the Com-

mittee. On his motion, the House voted to continue the Committee.

Section of Judicial Administration

Judge Chandler also reported for the Section of Judicial Administration, since he is the Section Delegate of that Section. Judge Chandler moved the approval of certain amendments to the Section's By-Laws, which was carried without debate.

He next offered a resolution that called for approval of the draft of a Model Judicial Article for State Constitutions, although he explained that he, personally was opposed to some of the provisions. He said that he did not approve of giving appellate courts power to censure trial courts, that appellate judges and trial judges ought to receive the same salaries, and that the provision for supervision of trial courts by appellate courts, in his view, was improper.

Judge Ivan Lee Holt, Jr., of St. Louis, Missouri, the Chairman-Elect of the Section, speaking in favor of the resolution, said that the Model Judicial Article was the result of three years' work by a distinguished committee. He admitted that there were "perfectly defensible" alternatives to many of its provisions, but he emphasized that this was a *model* article.

Paul Carrington, of Dallas, Texas, objected to the provision that the State Supreme Court by rule should govern admissions to the Bar and discipline of lawyers. "That places all jurisdiction for governing admissions to the Bar and discipline of members of the Bar exclusively in the Supreme Court", he said. "Where there is no integrated Bar, that, in my opinion is where it ought to be. But where . . . the state bar is integrated . . . the integrated Bar, in my opinion, should be given a voice in these matters." He was not asking that the provision be disapproved, Mr. Carrington said, but he was asking that an alternative be studied and considered for action by the House at the February meeting.

Judge Holt said that the Section would be delighted to comply with that request, and, on Mr. Carrington's motion, the House voted for such a study by the Section and by the Section of Bar Activities.

Mr. Carrington also objected to a provision in the Model Article which read: "The Chief Justice shall have the power to assign any judge or magistrate of the state to sit in any court of the state when he deems such an assignment necessary to aid the prompt disposition of judicial business." This could only mean that the chief justice was empowered to appoint lower court judges to sit on the Supreme Court, Mr. Carrington said. He declared that the principle against court-packing "is so urgently important that this House should not adopt the language. . . ."

Judge Holt replied that the Section felt that the provision designating the number of members of the supreme court would prevent the chief justice from seating lower court judges on that court. The language was intended to give flexibility to the powers of the chief justice, he added, and for that reason the Section had not adopted Mr. Carrington's suggestion.

Mr. Jenner, of Illinois, moved (as a substitute) that the Section's report be received and considered as a special order of business at the February meeting. "We cannot draft statutes . . . at a town meeting", he declared.

Mr. Jenner's motion was carried, and consideration of the Model Article was postponed.

American Law Student Association

James Dan Batchelor, of Norman, Oklahoma, the President of the American Law Student Association, reported briefly for that Association.

Peace and Law Through United Nations

W. St. John Garwood, of Austin, Texas, Chairman of the Committee on Peace and Law Through United Nations, offered the following resolution which was adopted without debate. As adopted, the resolution incorporated a slight change suggested by the Board of Governors:

Resolved by this House of Delegates of the American Bar Association that the Association hereby

1. Endorses in principle the policy of the Government of the United States in upholding the United Nations as an institution, which, despite the limitations inherent in such a body and despite the self-evident exploitation of it by certain states for propaganda and other egoistic purposes, remains as probably man's best hope for a peaceful and law abiding world;

2. Approves the opposition on the part of the Government of the United States to the seating in the United Nations of officials of the government known as the People's Republic of China as representative of China, with consequent displacement of the present representatives of China, to wit, members of the Government of the Republic of China;

3. Approves also of the opposition manifested by the Government of the United States to the proposal of the U. S. S. R. to abolish the office of Secretary General of the United Nations in favor of a committee of three representing respectively the Western (anti-communist) states, the communist states and the so-called "neutral" states;

4. Deplores the recent abuses made of the United Nations by sundry anti-western heads of State, particularly in respect of their most unstatesmanlike language and behavior, obviously inconsistent with the high deliberative purposes for which the institution was designed and calculated to destroy its usefulness in the promotion of world peace and law;

5. Appeals to its colleagues of the legal profession throughout the world, and especially to those of the newer states, to bear well in mind that attempted exploitation of the United Nations for selfish ends, including the promotion of antagonisms between its members could, within the not far distant future, destroy it, thus leaving the smaller and weaker states in a definitely less favorable position than they enjoy today;

6. Urges its aforenamed colleagues to keep their respective governments reminded of the explicit obligations of all members of the United Nations to settle, through the time-honored, peaceful means of settling international disputes, and particularly through recourse to the International Court of Justice, such controversies under international law as arise between them;

7. Commends the constructive efforts which have been and are being made under auspices of the United Nations, including the work of the International Law Commission, to clarify and round out international law in conveniently accessible form by means of multilateral conventions, although, at the same time, reminding the lawyers of the world that substantial progress in

this area necessarily involves concessions by individual states in the general interest, as conspicuously illustrated by the recent refusal of a small minority of states to agree to a six-mile limitation on the breadth of the territorial sea.

8. Orders that copies of this resolution be sent to the President of the United States, the Secretary of State, the Chairman of the Senate Foreign Relations Committee of the Senate, and the Chief of Mission of the United States to the United Nations and the Secretary General of the United Nations.

Board of Governors Report

On motion of Secretary Calhoun, the House voted approval of the report of the Board of Governors.

Expansion of Headquarters

Sylvester C. Smith, Jr., of Newark, New Jersey, Chairman of the Special Committee on Expansion of Headquarters, requested ratification of the Committee's plans to expand the American Bar Center buildings in Chicago by adding a new wing to cost $1,200,000. Mr. Smith explained that the American Bar Foundation would occupy the new wing since both the Cromwell Library and the research programs are crowded in the present quarters. He said that the American Bar Association Endowment had agreed to furnish about $454,000 for the new structure and the *Journal*, which also needs additional space and which will be accommodated if the wing is constructed, had agreed to furnish $135,000 from its surplus.

Mr. Coulter, the Treasurer of the Association, urged ratification of the Committee's report. He declared that the wing would be built without a request for pledges from the membership.

Mr. Bell, the Chairman of the Budget Committee, also was in favor of the resolution. "Giving the Foundation the quarters they need for expansion will take it out of the class of a stepchild of this Association and will make it a full-fledged Foundation with great research facilities", he declared.

President Seymour also called for ratification. "It is perfectly clear that the Foundation is going to grow in activity and stature . . . and you can take great pride in the design of the new wing", he declared.

The House voted to ratify the Committee's plans.

Administrative Law Section

Donald C. Beelar, of Washington, D. C., Delegate of the Section of Administrative Law, offered the following resolutions, which were adopted without debate:

I. *Whereas*, H.R. 6784 (87th Congress) would amend the Legislative Reorganization Act of 1946 to require the submission of administrative regulations for review by committees of Congress as a prerequisite to their promulgation;
Now, Therefore, Be It Resolved, That the American Bar Association opposes enactment of H.R. 6784 (87th Congress) or any other similar legislation calling for or requiring Congressional review of the administrative regulations of federal administrative agencies as a prerequisite to their promulgation.
Resolved Further, That the Section of Administrative Law be and is hereby authorized to act for and on behalf of the Association in opposing such legislation.

II. *Whereas*, It has recently been recommended to the President of the United States that there be a return to the system under the Wagner Act, whereby the National Labor Relations Board appointed its own General Counsel, and appointed and directed the staff both in Washington and the Regional Offices, and
Whereas, Such system combines in one agency the functions of prosecutor and judge, and
Whereas, The Taft-Hartley Act, amending the Wagner Act, was intended to separate the prosecuting and adjudicatory functions of the National Labor Relations Board, and
Whereas, Sound administrative procedure requires such separation,
Now, Therefore, Be It Resolved, That the American Bar Association believes in preserving the functions of prosecution and adjudication under the National Labor Relations Act in separate hands and therefore opposes any attempt to reunite them.

IV. The Section of Administrative Law recommends that the House of Delegates approve amendments to the By-Laws of the Section, as set forth in its report, creating the office of Chairman Elect, this recommendation subject to affirmative action on the pro-

posed amendments by the Section at its 1961 Annual Meeting.

Recommendation III was withdrawn.

Bill of Rights Committee

Rush H. Limbaugh, of Cape Girardeau, Missouri, Chairman of the Committee on Bill of Rights, expressed regret that the written report of his Committee had been misrepresented in some accounts in the press. The Committee had no intention of speaking for any members of the House, he declared. The report, to which Mr. Miller had earlier objected, contained among other things an analysis of Supreme Court decisions involving the Bill of Rights. One of the statements that had apparently aroused controversy was to the effect that "the outcome of the Public School cases of 1954 was by no means surprising to one who evaluated the preceding series of adjudications". One member of the Committee had objected to this statement in a separate statement attached to the Committee's report.

The House then recessed at 12:05 P.M.

Fifth Session

The House reconvened for its fifth session on Thursday, August 10, at 9:30 A.M.

Mr. Calhoun, the Secretary, announced the following winners in the election for five Assembly Delegates: Paul Carrington, of Dallas, Texas, 786 votes; Ronald J. Foulis, of the District of Columbia, 665 votes; Churchill Rodgers, of New York City, 617 votes; Joseph A. McClain, Jr., of Tampa, Florida, 596 votes; and John P. Bracken, of Philadelphia, Pennsylvania, 566 votes.

Electronic Data Retrieval

Reed C. Lawlor, of Los Angeles, Chairman of the Committee on Electronic Data Retrieval, moved that that Committee be continued, and the motion was carried.

Committee on Court Congestion

John Eckler, of Columbus, Ohio, Chairman of the Special Committee on Court Congestion, delivered a brief oral report summarizing the work of that Committee. On his motion, the Committee was continued

Section of Criminal Law

Rufus King, of Washington, D. C., the Delegate of the Section of Criminal Law, offered the following resolutions for the Section:

Resolved, that the House of Delegates of the American Bar Association approves and urges the enactment of the following bills proposed by the Attorney General as measures to aid in the control of organized crime and racketeering (pending in the 87th Congress):

S.1653 (prohibiting interstate travel in furtherance of a business enterprise relating to racketeering activities);
S.1654 (expanding the fugitive felon act to embrace all offenses punishable by one year's imprisonment or more);
S.1655 (extending the immunity device to the Taft-Hartley and Hobbs Acts);
S.1656 (Controlling the dissemination of gambling information);
S.1657 (outlawing the transportation of gambling paraphernalia);
S.1658 (amending the Johnson Act to reach the interstate transportation of gambling devices other than slot machines); and
S.1665 (providing protection for witnesses and others who may be intimidated in connection with Federal criminal investigations); and

Be It Further Resolved, that the Criminal Law Section be and it is hereby authorized to support and urge the enactment of the aforesaid bills, and similar bills introduced to effectuate the purposes thereof, before the Congress.

Mr. King explained that there had

been disagreement in the Section about endorsing S. 1654, and the Council of the Section had originally refused to include it in the list. The Council, however, had been overridden by the Section. He said that the Senate has passed all but S. 1654 and the six are now awaiting House action; S. 1654 is still in the Senate but has been released to the Floor of the House by the House Rules Committee.

In reply to a question by William A. Sutherland, of Atlanta, Mr. King said that the objection in the Section's Council to S. 1654 was that it was too broad an authorization. Offenses punishable by one year under state law include a whole panoply of things that really go far beyond organized crime and racketeering, he said. On the other hand, what really frustrates state law enforcement is the ease with which criminals can cross state lines and avoid prosecution because the authorities in another state simply don't have the time or the enthusiasm to arrest people wanted in another jurisdiction. The Justice Department, he added, is strongly in favor of the proposal.

On motion of Mr. Sutherland, S. 1654 was severed from the rest of the resolution and the House voted to endorse the other six bills without further debate.

Mr. Sutherland, speaking on S. 1654, said that he thought that adoption of a resolution by the House should indicate more or less a unanimous view that this is proper. "I think it greatly destroys the influence of this body, this American Bar Association, if we give our approval to matters just because the Department of Justice or somebody else wants them", he said. He moved that the matter be referred back to the Section.

Franklin Riter, of Salt Lake City, inquired whether the language of S. 1654 would include fathers charged with desertion. Many Western states attach a severe penalty to such desertion, he said.

Mr. King replied that the bill covered any offense for which the punishment is more than one year—it would give authority to the F.B.I. to apprehend such an offender, but not to prosecute them, he explained.

The House then voted. Mr. Sutherland's motion to refer back was lost and Mr. King's to endorse S. 1654 was carried.

Committee on State Legislation

William W. Evans, of Paterson, New Jersey, Chairman of the Committee on State Legislation, delivered a brief oral report for that Committee.

Section of International Law

Victor C. Folsom, of Boston, Delegate of the Section of International and Comparative Law, offered three resolutions for that Section. He described them as non-controversial and noted that the second had the concurrence of the Section of Real Property, Probate and Trust Law. The resolutions were adopted without debate:

I.

THAT *the House of Delegates adopt the following resolutions with respect to extension of the life of the Commission and Advisory Committee on International Rules of Judicial Procedure for five years, urging appropriation of adequate funds from Congress and authorization for officers of the Section of International and Comparative Law to appear before Congress to support the required legislation:*

Whereas, The Commission on International Rules of Judicial Procedure and its Advisory Committee established by Public Law 85-906 as amended by Public Law 86-287 will terminate by existing law on December 31, 1961, and it appears from the two Annual Reports of the Commission that the Commission has been unable fully to accomplish its important work because of the failure of financial support by the Congress, and

Whereas, the Commission and its Advisory Committee are now continuing their necessary research and drafting only because of a grant of Carnegie Corporation to Columbia University Law School, with which the Commission and its Advisory Committee are now cooperating, which grant will expire early in 1962, and

Whereas, the major portion of the task of the Commission and its Advisory Committee of studying existing practices of serving judicial documents abroad, obtaining evidence in foreign countries and making needed recommendations for improvements, particularly investigating foreign practice and procedure and drafting international procedural agreements, is yet to be accomplished,

Therefore, Be It Resolved, that the American Bar Association favors an extension of the life of the Commission and Advisory Committee on Interna-

tional Rules of Judicial Procedure for a period of five years, namely, to December 31, 1966, and

Further Resolved, that the Association urges the appropriation by the Congress of adequate funds for the effective operation of the Commission and its Advisory Committee, and

Further Resolved, that copies of this Resolution be sent to the appropriate Committees of the Congress, and that the officers of the Section of International and Comparative Law be authorized to appear before said Committees to support legislation extending Public Law 85-906 as amended by Public Law 86-287, or substantially similar legislation, and to urge apropriations of adequate funds, in conformity with this Resolution.

II.

THAT *the House of Delegates, adopt the following resolution with respect to the Proposed Estates Article:*

Whereas, the Department of State, after consultation with Sections of the American Bar Association, has revised its draft Consular Convention which it intends to propose to other governments so that the provisions therein governing reciprocally the authority of consuls with respect to estates of decedents no longer contain the features which this Association found objectionable, and

Whereas, the said revised draft has been examined and reported favorably by the Section of International and Comparative Law and by the Section of Real Property, Probate and Trust Law,

Now, Therefore, Be It Resolved, that the American Bar Association approve the revised draft provisions which the Department of State now intends to propose to other governments to govern reciprocally the authority of consuls with respect to estates of decedents, reading as follows:

PROPOSED ESTATES ARTICLE

(1) In the case of the death of a national of the sending state in the territory of the receiving state, without having in the territory of his decease any known heir or testamentary executor, the appropriate local authorities of the receiving state shall promptly inform a consular officer of the sending state.

(2) A consular officer of the sending state may, within the discretion of the appropriate judicial authorities and if permissible under the then-existing applicable local law in the receiving state:

(a) take provisional custody of the personal property left by a deceased national of the sending state, provided that the decedent shall leave in the receiving state no heir or testamentary executor appointed by the decedent to take care of his personal estate; provided that such provisional custody shall cease upon the appointment of an administrator;

(b) administer the estate of a deceased national of the sending state who is not a resident of the receiving state at the time of his death, who leaves no testamentary executor, and who leaves in the receiving state no heir, provided that if authorized to administer the estate, the consular officer shall relinquish such administration upon the appointment of another administrator;

(c) represent the interests of a national of the sending state in an estate in the receiving state, provided that such national is not a resident of the receiving state, unless or until such national is otherwise represented.

(3) Unless prohibited by law, a consular officer may, within the discretion of the court, agency, or person making distribution, receive for transmission to a national of the sending state who is not a resident of the receiving state, any money or property to which such national is entitled as a consequence of the death of another person, including shares in an estate, payments made pursuant to workmen's compensation laws or similar laws, and proceeds of life insurance policies. The court, agency, or person making distribution may require that a consular officer comply with conditions laid down with regard to (a) presenting a power of attorney or other authorization from such nonresident national, (b) furnishing reasonable evidence of the receipt of such money or property by such national, and (c) returning the money or property in the event he is unable to furnish such evidence.

(4) Whenever a consular officer shall perform the functions referred to in paragraphs (2) and (3) of this Article, he shall be subject, with respect to the exercise of such functions, to the laws then in force in the receiving state and to the jurisdiction of the judicial and administrative authorities of the receiving state in the same manner and to the same extent as a national of the receiving state.

(5) Nothing herein shall authorize a consular officer to act as an attorney-at-law.

THAT, the American Bar Association express its appreciation to the Department of State for having consulted appropriate Sections of this Association regarding such provisions, which would directly affect American attorneys; and

THAT, the Secretary transmit a copy of this resolution to the Secretary of State.

III.

That the House of Delegates adopt the following resolution with respect to indemnification of space contractors:

Resolved, That the American Bar Association finds that a reasonable need exists for the Federal Government to indemnify its space contractors against the results of certain unusually hazardous risks to the general public involved in contract performance, and accordingly recommends the enactment of appropriate legislation consistent with the following principles:

(a) That the indemnity should protect persons concerned who may become liable, including prime contractors and sub-contractors engaged in supply and construction contracts, as well as research and development contracts.

(b) That indemnification of space contractors should be limited to a high level of damages, such as $500,000,000 for each incident, and that liability of the contractors should be subject to the same limitation.

(c) That indemnified contractors should be required, as a condition of indemnification, to maintain the maximum amount of financial protection, including insurance, available on reasonable terms.

(d) That administrative settlement be provided for minor claims, and payment of meritorious claims above a stated amount require congressional action.

(e) That consideration should be given to seeking appropriate interna-

tional agreements governing claims for personal injury and property damages resulting from unusually hazardous risks involved in the performance of government-approved space activities.

President Seymour then presented Congressman Emanuel Celler, Chairman of the House Judiciary Committee, who spoke briefly.

Jurisprudence and Law Reform

Karl C. Williams, of Rockford, Illinois, Chairman of the Committee on Jurisprudence and Law Reform, said that his Committee was working on the problem of succession to the Presidency in the event of the disability of the President and that bills were pending in Congress to carry out principles endorsed by the Association a year ago. He also reported that a bill had been introduced in Congress designed to secure the active participation of nine judges on the Supreme Court in all matters before it.

Participation in the 1964 World's Fair

The House voted to continue the Special Committee To Consider Possible Participation of the Legal Profession in the 1964 World's Fair.

Committee on Military Justice

The House also voted to continue the Special Committee on Military Justice.

The report of the Publications Committee, which dealt with administrative matters, was referred to the Board of Governors.

Section of Family Law

Clarence Kolwyck, of Chattanooga, Tennessee, Delegate of the Section of Family Law, gave an oral report which recalled the history of the Association's work in the family law field.

Unemployment and Social Security

The report of the Committee on Unemployment and Social Security was delivered by the Chairman, Earl F. Morris, of Columbus, Ohio. Mr. Morris said that his Committee had been studying state legislation implementing the Kerr-Mills Act, which provides substantial federal financing for state programs of medical assistance to the aged. He said that thirty-four states had passed legislation broad enough to put the Kerr-Mills Act into effect in those states, and this meant that 65 to 70 per cent of the persons over age 65 are covered. He outlined the new amendments to the Social Security Act and said that his Committee was continuing to oppose the King-Anderson Bill, which is merely the Forand Bill as reintroduced. The Association is previously on record as opposing the Forand Bill.

Revision of Canon 35

Richmond C. Coburn, of St. Louis, Chairman of the Committee on Revision of Judicial Canon 35, said that it had attempted to obtain financing from the motion picture and television industry of a pilot study to determine the reaction of the use of television and cameras in court upon participants in trials, but it had been unsuccessful. The cost of a pilot study would be around $35,000, Mr. Coburn said, and the Committee did not recommend that the Association pay the entire cost, especially in view of the fact that the pilot study might lead to a much more expensive comprehensive final study. On his motion, the Committee was continued.

Committee To Cooperate with American Medical Association

On motion of Chairman Frank C. Haymond, of Charleston, West Virginia, the House voted to continue the Committee To Co-operate with the American Medical Association.

Corporate Lawyers' Program

On motion of Mr. Stecher, the House voted to continue the Committee on Corporate Lawyers' Program for furtherance of its original purpose with provision that it study and report on ways in which the Association might be of additional service to lawyers in corporate employment.

Rights of the Mentally Ill

On motion of Secretary Calhoun, the House voted to continue the Committee on Rights of the Mentally Ill.

Uniform State Laws

On motion of the President of the National Conference of Commissioners on Uniform State Laws, George R. Richter, Jr., of Los Angeles, the House voted to approve the Uniform Death Tax Credit Act, the Uniform Non-Resident Individual Income Tax De-

ductions Act and the Uniform Code of Military Justice.

Committee on Draft

The House voted unanimously to adopt the following resolution offered by Arthur VD, Chamberlain, of New York City, the Chairman of the Committee on Draft:

> *Be It Resolved*, That the American Bar Association expresses its deep appreciation and sincere gratitude to the staff, the members of the Bar Association of St. Louis, their lovely ladies, the Host Committee, the Missouri State Bar Association and all those who have worked in cooperation with them for their gracious hospitality and for the many services which they have rendered in making this meeting such a great success.

The House then recessed at 11:10 A.M.

Sixth Session

The sixth session of the House was held on Friday, August 11, convening at 9:33 A.M.

William Poole, of Wilmington, Delaware, Vice Chairman of the Rules and Calendar Committee, reported that all of the amendments to the Constitution and By-Laws adopted by the House were adopted by the Assembly at its session on Thursday.

George H. Turner, of Lincoln, Nebraska, Chairman of the Resolutions Committee, reported on the disposition by the Assembly of four resolutions introduced there.

Mr. Turner reported that Resolution No. 5, submitted by Cody Fowler, Harold J. Gallagher, Ross L. Malone, David F. Maxwell, John D. Randall, Charles S. Rhyne, John C. Satterfield, Bernard G. Segal, Whitney North Seymour, Sylvester C. Smith and Loyd Wright, had been adopted by the Assembly and recommended that the House concur in this action. The resolution read as follows:

> *Whereas*, by express arrangement with the present and past Attorneys General of the United States, the Standing Committee on Federal Judiciary of the American Bar Association traditionally does not propose persons for appointment to federal courts, but restricts its activities to investigating and reporting on the qualifications of persons whose names are referred to it by the Attorney General, and
>
> *Whereas*, it is the sense of the American Bar Association that the functions of recruiting the best qualified judges and lawyers for appointment to the federal bench, and co-operating directly with the United States Senators and others proposing persons to the President of the United States and the Attorney General of the United States for appointment as federal judges, can be performed most effectively by the state and local bar associations in the respective areas in which vacancies exist,
>
> *Resolved*, that the American Bar Association urges all state and local bar associations in areas in which vacancies in federal courts exist, to undertake and carry out the critical functions of
>
> (a) recruiting and persuading the best qualified judges and lawyers to accept appointment if tendered, and
>
> (b) establishing liaison and working with the United States Senators and other responsible sources who propose persons to the President of the United States and the Attorney General of the United States for appointment, to the end that only the best qualified judges and lawyers shall be proposed for appointment to the federal courts.

The House adopted this resolution.

The new officers and members of the Board of Governors were introduced, and the House then adjourned *sine die* at 9:47 A.M.

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